Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1997

K & K CONSTRUCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY, a Michigan Corporation,
Petitioners,

v.

THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES and STATE OF MICHIGAN,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining the "relevant parcel" for a takings analysis may a court consider not only the property on which the government has denied all use, but also other contiguous properties owned in whole or in part by the same owners?

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The Petitioners, K & K Construction, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Michigan Supreme Court, entered in the above-entitled proceeding on March 24, 1998.

OPINIONS BELOW

This petition is from a decision of the Michigan Supreme Court reported at 456 Mich. 570, 575 N.W.2d 531 (Mich. 1998), and reproduced as Appendix A. Page references are to the appendix.

The Michigan Supreme Court decision reversed a Michigan Court of Appeals decision, *K & K Construction Co. v. Michigan Department of Natural Resources*, reported at 551 N.W.2d 413 (Mich. App. 1996). This decision is reproduced as Appendix B.

There were three relevant decisions by the Michigan Court of Claims. The Final Judgment and Award of Damages to Plaintiffs Against Defendants DNR and State of Michigan and Awarding Costs and Attorneys Fees (Trial Court Final Decision) dated September 9, 1993, is reproduced as Appendix C. The Opinion and Order of May 4, 1993 (Trial Court Second Opinion), is reproduced as Appendix D. The Opinion and Order of November 5, 1992 (Trial Court First Opinion), is reproduced as Appendix E.

JURISDICTION

The opinion of the Michigan Supreme Court which is the subject of this petition was filed and entered on March 24, 1998. This petition for writ of certiorari is timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution states in relevant part: "[N]or shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

INTRODUCTION

This is the story of how the Michigan Department of Natural Resources can take away a 55-acre parcel of land from its owners and avoid paying just compensation. As will be shown, the owners first sought a permit to use the 55-acre parcel for a restarurant and sports complex. The permit was denied because the state discovered 27 acres of wetlands in the middle of the property. Next the owners sought a permit to make use of an irregular ring of uplands on the 55-acre parcel that surrounded the wetland. Although the owners would have sacrificed the wetlands--creating a de facto wetlands preserve for the state, that permit was also denied.

The owners sued for a taking. After the owners prevailed in the trial court, the state belatedly granted the permit to use the nonwetland portion of the property. The owners persisted, however, and continued to argue that they had (1) suffered a temporary taking of the 55-acre parcel and (2) suffered a permanent taking of the wetlands. In a nutshell, the owners based their allegations upon two facts: (1) all use of the 55 acres had been denied for several years giving rise to a temporary taking, and (2) all use of the wetlands had been permanently denied, giving rise to a permanent taking.

According to the Michigan Supreme Court, however, it cannot be said that all use of property had been denied because the owners happened to own several other parcels contiguous to the 55-acre parcel. These other parcels had to be considered in determining whether there had been a denial of sufficient economically viable use for there to have been a taking. The

Michigan court's requirement that other parcels be considered in determining whether there has been a denial of all economically viable use is totally contrary to the settled law in numerous state courts and federal circuits.

These other courts all employ a variety of tests to determine what the "relevant parcel" is when analyzing whether there has been a taking of economically viable use. Despite the disparate approaches taken by these other courts, they all disagree with the Michigan court's novel methodology. And, as a number of commentators have pointed out, the reason why there are so many varying approaches is because this Court has not yet provided guidance to the lower courts, the Nation's landowners, and the Nation's regulators. By taking this case, this Court will have an excellent vehicle for providing that guidance.

A. The Property

This litigation involves four parcels.

1. Parcel One

Parcel One borders Highway 59 and was originally purchased by Joseph and Elaine Kosik in a common law partnership along with several other partners in 1976. Trial Court First Opinion and Order, Appendix E at 2. This parcel is the heart of the current dispute. In 1986 the property was transferred to J.F.K. Company, a Michigan Limited Partnership consisting of the five children of Joseph and Elaine Kosik. Appendix A at 1. In contrast to the other parcels in this case, the Kosiks retain a reversionary interest in the property. Appendix E at 2, 6; Appendix A at 2 and 9 n.5 ("At the very least . . . J.F.K. shares a joint ownership interest in the property with Mr. and Mrs. Kosik."). At about the same time, Resorts and Company obtained an interest in the property. Appendix A at 2. A small restaurant, the Ram's Horn, was built on a small portion of this

parcel and sold. Appendix A at 2 n.1.[1] The J.F.K. office building is also located on a part of an adjoining parcel that borders the highway. Appendix A at 2 n.1; and 11 n.9.

Parcel One is now 55 acres, of which approximately 27 to 28 acres are delineated as a wetland under Michigan's Wetlands Protection Act. Appendix A at 2-3; Appendix E at 2. These wetlands are highly irregular, "such that large fingers of protected [i.e. wetlands] property run throughout the center of the property." Appendix E at 3. Unlike the other parcels in this case, Parcel One is zoned for commercial use. Appendix A at 2.

2. Parcel Two

Parcel Two is an undeveloped 16-acre parcel that is directly south of Parcel One. Appendix A at 2. It was purchased at the same time as Parcel One. Appendix E at 3. Title now belongs solely to J.F.K. Company as a result of an irrevocable testamentary trust created by the Kosiks before this litigation commenced. Appendix E at 3. Parcel Two is zoned for multiple family residential. Appendix A at 2. It contains a small amount of wetlands. Appendix A at 2. It is not, however, subject to the Wetlands Protection Act which affects Parcel One. Appellate Court Decision, Appendix B at 7.

3. Parcel Three

Parcel Three is a 9.34-acre parcel of property owned in Partnership by J.F.K. Company and Resorts and Company, a Michigan Partnership. Appendix E at 3. It is located directly south of Parcel Two and does not touch Parcel One. J.F.K. and Resorts and Company built apartments on this property that are in use today. Appendix E at 3. It is zoned for multiple

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[1] While the Michigan Supreme Court states that the restaurant was part of the parcel, the record reflects that the restaurant was on a separate parcel. Testimony of William J. Goga, Appellant's Appendix at the Michigan Supreme Court at 048a.

residential. *Id.* and Appendix A at 2. It is wetlands-free. Appendix A at 2.

4. Parcel Four

Parcel Four is a 3.4-acre parcel of undeveloped land that borders the south side of Parcel One and the east side of Parcel Two. Appendix A at 2. It is owned by J.F.K. Company, contains no wetlands, and is zoned for multiple residential. Appendix A at 2. This parcel was purchased later as part of the "Barrymore Plan" discussed next. Appellant's Appendix at the Michigan Supreme Court at 345a.

B. The Development Plans

1. The Barrymore Plan

After holding the property for several years, and after clearing up some preliminary title issues not relevant to this case, the owners decided to fully develop their property. (Previously, there had been some minor development and sale of a small restaurant and the construction of J.F.K.'s office). Their plan was to build a "C. J. Barrymore's" restaurant and sports complex on 42 acres of Parcel One. Appendix A at 2, Appendix B at 2. The plan contemplated that some storm water would flow to a pond on the southern parcels. *See* Appellant's Appendix in Michigan Supreme Court at 306a-307a.[2] An application to develop the property was submitted on May 28, 1988, and denied on November 7, 1988, because respondent Michigan Department of Natural Resources found that between 27 and 28 acres of protected wetlands on Parcel One would be affected. Appendix A at 2; Appendix B at 2.

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[2] The Michigan Supreme Court mistakenly wrote that the Barrymore Plan also involved multihousing units and storm water retention on Parcels Two and Four. Appendix A at 2. In fact, only the subsequent Goga Plan involved development on the other parcels. *See, e.g.*, Appellant's Appendix at 68a, 306a-308a filed in the Michigan Supreme Court. This mistake, however, is not a factor in this petition.

2. The Goga Plan

On May 1, 1990, Petitioners submitted a scaled back plan prepared by their consultant, William J. Goga. The plan would have developed a narrow discontinuous ring of upland bordering the wetlands that made up the center of Parcel One. This would leave all but 3.17 acres of wetlands intact. Appendix A at 3 and Appendix B at 3. Plaintiffs proposed to mitigate the loss of wetlands by the conversion of 5.36 acres of uplands into new wetlands. Appendix A at 3, Appendix B at 3. This plan involved 72 acres on Parcels One, Two, and Four (including setting aside 28 acres existing and newly created of wetlands for conservation purposes). Appendix B at 3. The Goga plan was denied on July 26, 1990. Appendix B at 3.

C. The Litigation

1. The Michigan Court of Claims

After the Barrymore Plan was denied, but before the Goga Plan was submitted, plaintiffs filed the present appeal on December 29, 1988. Appendix B at 2. Initially, Plaintiffs challenged whether the property was in fact a wetland. Appendix B at 2. By the time the trial was held on December 17, 1991, the only issue was whether there had been a taking of plaintiffs' property. Appendix B at 3. On November 5, 1992, the trial court ruled that "the geographic configuration of the wetland so restricts the ability to use Parcel One, that the Plaintiffs have been deprived of any reasonable return on the good faith economic investment they have made." Appendix E at 11. The court specifically found that the "property has been condemned by application of the Wetland Preservation Act." Appendix E at 11.

Following the November 5, 1992, decision the Michigan Department of Natural Resources attempted to mitigate its damages by allowing development to commence under the "Goga Plan." Appendix A at 3, Trial Court Second Opinion, Appendix D at 5. On May 4, 1993, the trial court ruled that

plaintiffs should recover the value of the wetlands taken, as well as those created in mitigation, pursuant to the Goga plan. Appendix B at 11, Appendix C at 3-4.

On September 8, 1993, the court awarded plaintiffs $3.24 million for the 28.77 acres of Parcel One that was taken,[3] plus $1.57 million in interest. Appendix C at 3-4, Appendix A at 4. The court also awarded $459,000 including interest for the uplands portion of Parcel One that was temporarily taken between the time the Barrymore Plan was denied and the Goga Plan approved. Appendix C at 3-4, *see* Appendix A at 4.

2.- The Appeal

The state appealed. On June 7, 1996, the Court of Appeals of Michigan affirmed. Appendix B. The court of appeals held that the trial court's finding that Parcel One "was essentially worthless as commercial real estate . . . is not clearly erroneous based on the evidence." Appendix B at 9. The appeals court agreed with the Court of Claims, finding that "27 acres of the parcel were temporarily taken and 28 acres were permanently taken." Appendix B at 12.

Once again, the state appealed. On March 24, 1998, the Michigan Supreme Court reversed. The court found that Parcel One could not be considered by itself in determining whether there had been a taking. Instead, the court instructed the trial court to lump Parcels One, Two, Four, and possibly Parcel Three together when it considered the severity of the economic impact caused by the application of the wetlands law. Appendix A at 8, 12. In other words, although it was clear that all use of the 55-acre parcel had been temporarily denied, and that all use of 28 acres had been permanently denied, there was no denial of "all economically viable use," this Court's test for a "categorical"

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[3] This is more than the original 27 acres of delineated wetland due to the conversion of uplands into wetlands in accordance with the Goga Plan's mitigation proposal.

taking, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (notes that with a "categorical" taking the government is always liable). The Michigan court found that there was no denial of all economically viable use because the owners possessed two or three other nearby parcels of land. Those other parcels might supply enough economic utility to the owners' overall contiguous property holdings in the area to negate the existence of a categorical taking of either the 55-acre Parcel One or the 28-acre wetland hole. Appendix A at 11. The court also found that the potential residual of "some financial value" in Parcel One negated a categorical taking of the 55 acres.[4] Appendix A at 15 n.13.

With respect to Parcels One, Two, and Four, the court was impressed by their "contiguity," the "unity of J.F.K.'s ownership interest in all three of these parcels, and plaintiffs' proposed comprehensive development scheme." Appendix A at 8. The court was not concerned that the ownership interest by the Kosik's in Parcel One negated the "common ownership" pattern by J.F.K. Appendix A at 9 n.5. Nor was the court impressed by the fact that Parcel One was subject to a different zoning designation. Appendix A at 9 n.6. Because the court was uncertain of the significance of the fact that Parcel Three was owned by Resorts and Company, it remanded this question to the trial court. Appendix A at 12. (The ownership pattern of Parcel Three is not relevant to this petition.) It also found that two small parcels that had been sold off several years before the

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[4] This Petition for Writ of Certiorari involves only the question of what the relevant parcel is and not whether the facts do or do not point to a categorical taking of the 55 acres. Once the relevant parcel is ascertained, the Michigan court can determine whether any remainder value negates the presence of a taking caused by the prohibition of all ***use*** of the property. As this Court emphasized in *Lucas*, it is the denial of all ***use*** that gives rise to a categorical taking. 105 U.S. at 1015.

Barrymore Plan must be considered as well. Appendix A at 11 n.9.

The court continued by holding that when Parcels One, Two, and Four are considered together there was not a categorical taking of plaintiffs' property. Appendix A at 14-15. On remand the Supreme Court ordered the trial court to "compare the value removed from the plaintiffs' land, and also calculate what value remains. It then must reevaluate the case under the three-part balancing test" of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Appendix A at 15-16.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In Michigan, while the law in its majestic equality prohibits the poor as well as the rich from stealing,[5] it is acceptable for the state, in its own magisterial egalitarianism, to take land from those who own other land.

Where Petitioners once had a sound investment in their property, they have now been left with a marginal 55-acre parcel with a gaping irregularly shaped hole in the center. The State of Michigan has taken this hole for a de facto wetlands preserve, to be, for all practical purposes, "left substantially in its natural state."[6] Twice it turned down proposals to use the parcel; first it denied the use of 42 acres, then it even denied the use of a discontinuous ring around the wetlands hole.

Having taken the heart out of the property, and having denied all use of the whole parcel during the years that it had

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[5] "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread." Anatole France.

[6] Regulations that require "land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service." *Lucas v. South Carolina Coastal Council*, 105 U.S. at 1019.

denied both the Barrymore and Goga Plans, Michigan has steadfastly refused to admit any liability for the injury it has inflicted upon the owners. After having lost at the trial court and the intermediate court of appeals, the state was ultimately able to convince the Michigan Supreme Court that a takings analysis should consider not the wetlands on which all use was proscribed, and not even on the discrete legal parcel subject to the regulation. Instead the Michigan court insists that the takings analysis must consider at least two other separate legal parcels that (1) do not contain wetlands subject to the regulatory scheme, (2) are subject to different zoning, and (3) while there is some overlap in ownership, are ***not*** owned by identical ownership interests.

In evaluating the "relevant parcel" in a takings analysis of real property most courts, in contrast to Michigan, focus upon the regulated property, and not the extraneous circumstances of the owner. The best approach to ensure that "[g]overnment [does not force] some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), is to look at the land the government has actually regulated. Where, as here, the regulation sterilizes all reasonable use of a discrete fraction of an otherwise economically useful parcel of land, the courts must direct their takings analysis at that fraction. In this case, all use has been prevented on 28 acres of property owned by J.F.K. and the Kosiks. Under *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1015, that is a categorical taking. As the intermediate court of appeals correctly found, there was a permanent taking of this 28 acres. Appendix B at 12.

Even if a court were reluctant to focus only upon the fraction of a parcel actually subject to the confiscatory regulation, it would be acceptable under some circumstances to focus on the whole legal parcel of land subject to or affected by the offending regulation. Here the denial of both the Barrymore

and Goga Plans resulted in a temporary taking of the entire 55-acre parcel. Most state and federal appellate courts that have considered the issue have chosen to look at the takings question on a parcel-by-parcel basis, treating differently zoned parcels as discrete units for analysis. In fact most courts would have considered the disunity of ownership combined with the application of different zoning and regulatory constraints as decisive factors in segregating Parcel One from other property owned by J.F.K. and the Kosiks.

Because the decision below conflicts with the holdings of numerous federal and state appellate courts, because these appellate courts have devised a myriad of inconsistent methods for determining the "relevant parcel" (sometimes openly disagreeing with one another by name), and because of the growing clamor from the legal commentators for this Court to step in and resolve the confusion and uncertainty, there is a need for this Court to grant this Petition for Writ of Certiorari.

I

WHILE THE FEDERAL COURTS ARE IN DISARRAY OVER HOW TO MEASURE THE RELEVANT PARCEL FOR TAKINGS PURPOSES THEY ARE ALL IN CONFLICT WITH THE MICHIGAN SUPREME COURT

A. The Federal Circuit Has Refused to Elevate Substance over Form and Has Focused on the Actual Property That the Government Has Regulated

In *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (*Florida Rock I*), the Federal Circuit Court of Appeals was confronted by a single 1,560-acre parcel subject to the Corps of Engineers' restrictions. The landowner originally argued that all 1,560 acres of its wetland mining property had been taken after a permit to mine 98 acres was denied, 791 F.2d at 895-96, 904-

05.[7] The government argued, on the other hand, that there was ***no*** taking because the use of only 98 acres had been denied--leaving the "parcel as a whole" largely unaffected by the denial. *Id.* at 904. The Federal Circuit rejected both arguments, holding that (1) it would be unfair to award compensation for property for which the applicant had no immediate *plans*, *id.* at 904-05, and (2) the idea that there was some value to the remaining 1,458 acres (which would give meaning to the government's "parcel as a whole" value argument) was totally unrealistic under the circumstances. *Id.* at 904.

The point of *Florida Rock I* is that it is appropriate to look at just the fraction of land that government has regulated.

This approach is entirely ***consistent*** with the Michigan ***Court of Appeals*** decision that focused on the entire 55-acre parcel of property in the context of a temporary taking effected when the Barrymore and Goga Plans were turned down. The *Florida Rock I* holding is also consistent with the Michigan intermediate court's focus on the 28 acres of wetlands core and mitigation property in the context of a permanent taking of that 28 acres.

The approach in *Florida Rock I*, however, is entirely ***inconsistent*** with the Michigan ***Supreme Court's*** decision. Instead of confining its analysis to either the wetlands subject to permanent prohibitions, or the 55-acre parcel on which all use had been twice denied at least temporarily, the Michigan Court lumped together all the surrounding parcels owned in whole or in part by the owners of the 55-acre parcel.

Several years after *Florida Rock I* was decided, the Federal Circuit in a later iteration of the same case responded to the government's new argument that the takings denominator should include more than the mineral rights and surface resources

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[7] The Corps of Engineers would consider a permit only for a three year mining plan, in this case 98 acres. *Id.*

needed for mining. The court disagreed. It suggested that, in looking at the takings denominator in a regulatory takings case, it can be appropriate to look at a subset of the strands of the individual rights that make up a property: " By taking some portion of Florida Rock's economic use of the property--its power to disturb the overlying wetlands, and with it the common law property right to mine its subsurface minerals--the Government appears to have destroyed part of the value of Florida Rock's holdings." *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1572 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995) (*Florida Rock IV*). In appropriate circumstances a subset of the bundle of rights can be taken through inverse condemnation. *See id.* at 1572 n.32.

In *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the same court was confronted with a claim for a taking of a 12.5-acre parcel of wetland property that was once part of a larger 51-acre parcel of which some 38.5 acres had been dedicated as a wetlands preserve in order to obtain permits from the State of New Jersey. Originally, the 51 acres had been part of a 250-acre parcel, of which 199 acres had been developed, and subdivided, and mostly sold in the past. *Id.* at 1180.

The government argued in *Loveladies* that the relevant parcel must be the original 250-acre parcel, or in the alternative, the 51-acre parcel. The Federal Circuit had no trouble holding that the property developed and sold before the imposition of the current regulatory environment should not be considered in the denominator. *Id.* at 1181. That is quite opposite the Michigan court's suggestion that parcels already developed and sold must be made part of the takings denominator. *See* Appendix A at 11 n.9.

As for the 38.5-acre parcel, the court suggested it would be "ungrateful in the extreme to require **Loveladies** to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the givers." *Id.* (emphasis added). The Federal

Circuit's focus in a multiparcel context upon the property actually affected by the relevant government regulation, rather than on an artificial construct of what the owner may have owned in the past, is in stark contrast to the approach of the Michigan Supreme Court. If the plaintiffs in either *Loveladies* or *Florida Rock* had brought their takings claim in Michigan, the results would have been very different.[8]

Finally, it should be noted in the context of mineral leases, the Federal Circuit has separated out a coal deposit from the surface rights. In *Whitney Benefits v. United States*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991), the court rejected the government's suggestion that there was no taking because the coal owner could farm about half of the property. Noting that the mining company bought the farm not to farm it but solely to facilitate mining, the court ruled, "Wyoming recognizes separate mineral and surface estates . . . and mineral rights are clearly property subject to the taking clause of the Fifth Amendment." 926 F.2d at 1174 (citation omitted).

The segmentation in *Whitney Benefits* (and that discussed in *Florida Rock IV*, 18 F.3d at 1572 n.32) did not involve what is often referred to as "horizontal" segmentation where land is divided into discrete geographic units such as in a residential subdivision or where land is set aside for a nature preserve. While horizontal segmentation is often easier to visualize, non-horizontal segmentation of land, such as with mineral rights, air rights, or development rights is well established in the law. That

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[8] The Court of Federal Claims has demonstrated confusion over what constitutes the relevant parcel for the takings analysis. In several instances, the trial court has reached out to include other lands owned by the same owners. *See, e.g., Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); *Deltona Corporation v. United States*, 657 F.2d 1184 (Ct. Cl. 1981); and *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981). While these cases are factually distinguishable from *Florida Rock*, *Loveladies*, and this case, language in these cases suggests a need for clearer guidance from this Court.

the Federal Circuit in *Whitney Benefits* and *Florida Rock IV* acknowledged that it could be appropriate to focus a takings inquiry on what has actually been regulated or restricted even in the context of nonhorizontal segmentation of land, demonstrates just how different the Federal Circuit is from the Michigan court.

B. The Tenth Circuit Has Taken an Approach That Is in Conflict with the Federal Circuit

Doctrinal harmony does not prevail in the federal circuits over the issue of how the relevant parcel should be measured. The Tenth Circuit in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), expressly rejected the *Florida Rock IV* holding on this issue. *Clajon* involved an attempt to bring a takings challenge to hunting regulations in Wyoming that limited wild game licenses sold to hunters from out of state. The plaintiff, who owned a ranch and derived significant income from out of state hunters, complained that this somehow was a taking of his "right to hunt." 70 F.3d at 1577.

Faced with this rather odd argument, however, the Tenth Circuit did more than simply say that the regulation was lawful and that there was no property interest at stake. It also took the trouble to expressly reject the Federal Circuit's language in *Florida Rock IV* that it can be appropriate to focus more narrowly on the property interest actually taken: "However, we believe that the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land . . . . Thus, we reject the *Florida Rock* approach." *Id.* (citations omitted).

It is not clear what the Tenth Circuit would have done if faced with the denial of the right to use the property belonging to the Kosiks and J.F.K. It was not presented with a situation where the government regulation itself segregates property into geographically distinct components. Nor was the court faced with an attempt to merge discrete separate legal parcels into a

single unit. Nonetheless, the Tenth Circuit's decision to expressly reject the Florida *Rock IV* formulation highlights an actual conflict with the Federal Circuit that may or may not indicate a potential conflict with Michigan.

C. The Ninth Circuit Has Suggested That the Uniformity of the Regulation Is a Key Factor in Determining the Relevant Parcel

Yet another approach to determining the relevant denominator in a takings context was spelled out by the Ninth Circuit in *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981). In this case the county placed two contiguous sections of an owner's property into two distinct zoning classifications: A 48-acre section called Strawberry Spit zoned as "urban open space" with a 5-acre minimum lot size and a 20-acre section known as "Strawberry Point" that was zoned to allow four "multiple residential units" per acre. *Id.* at 367. The owner alleged a taking of Strawberry Point. In response the county advocated a "single parcel" theory under which both the point and the spit would be considered together in a takings analysis.

The court first noted that the county's position was "inconsistent with general principles governing taking questions." *Id* at 369. It next rejected as inapplicable cases where property was treated as a single unit for takings purposes because in those cases "the entire subject property was covered by a uniform restriction." *Id.* Instead, the court noted that in *Nectow v. Cambridge*, 277 U.S. 183 (1928), this Court "considered the smaller tract separately from the larger tract." 653 F.2d at 370.

The Ninth Circuit also agreed with dicta in *Fifth Avenue Corp. v. Washington County*, 581 P.2d 50 (Ore. 1978), where "the court divided the property analytically into two parcels" depending on whether they were zoned as developable or not. *American Savings*, 563 F.2d at 370. Ultimately, the Ninth

Circuit was unable to determine whether the Strawberry Spit should be considered separately, because the "appellant did not submit a development plan" making it "unclear whether the Spit and Point would be treated separately at the development stage." *Id.* at 371.

Most significantly, the *American Savings* court concluded by holding that if ***the appellant can show that "the Spit and Point have been, or would be, treated separately when its development plans are submitted . . . [then] the Spit must be analyzed as a separate parcel for takings purposes.***" *Id.* at 372 (emphasis added).[9]

This holding is clearly at odds with the Michigan court's holding in *K & K*. First, the Michigan court refused to consider the 55-acre parcel, zoned for commercial use, separately from the other parcels zoned for multiunit residential. Second, the Michigan court refused to consider separately that portion of the property that was subject to a unique regulatory scheme, i.e., the 28 acres of wetlands and wetlands mitigation. Third, the Michigan court found the fact that the owners had submitted a development plan encompassing several parcels to justify an

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[9] Accord, *Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990). In deciding to treat different portions of a single legal property as separate parcels, the court notes that the property

> has not been developed by Bishop [the owner] as part of the residential community. . . . [The owners] have always considered Queen's Beach [the distinct property] a separate area on which they seek to build a resort. ***Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes.*** In summary, under the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking.

649 F. Supp. at 947-48 (emphasis added).

expanded takings denominator.[10] In contrast, the Ninth Circuit ***required*** such a submission in order to prove that the county would, in fact, treat the property as separate parcels.[11]

II

THE STATE COURTS ARE IN A SIMILAR CONFLICT WITH THE MICHIGAN SUPREME COURT

A. The Oregon Supreme Court Treats a Uniquely Regulated Portion of Property Separately for Takings Purposes

In contrast to the Michigan Supreme Court the Oregon Supreme Court has consistently viewed the takings denominator in a realistic manner. Most recently, in *Boise Cascade Corporation v. Board of Forestry*, 935 P.2d 411 (Ore. 1997), the court had to decide how to deal with a 64-acre parcel of timberland on which a spotted owl established residency. As a result of the owl's settlement on Boise Cascade's property, the Board of Forestry established a 56-acre buffer zone around the owl's nest, leaving 8 acres available to be logged only in the rainy season. *Id.* at 415-16. Boise sued, alleging, among other things, a denial of all economically viable use of its 56 acres.

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[10] As a practical matter by holding the fact that the Michigan property owners submitted a single development plan for several parcels as a rationale to expand the "relevant parcel" in the takings analysis, the Michigan court is encouraging piecemeal development plans, surely an anathema to the goal of orderly planning and development.

[11] *American Savings* is to be distinguished from cases like *MacLeod v. County of Santa Clara*, 749 F.2d 541, 547 (9th Cir. 1984), where the Ninth Circuit declined to treat timber rights on a parcel of land separate from the surface estate. The property had long been used as a cattle ranch. Noting that economically viable use of the ranch property remained, the court declined the owner's invitation to segment the property into a timber use only property right. The rejection of this nonhorizontal segmentation is more consistent with *Clajon* than *Whitney Benefits*.

In recent years the Oregon Supreme Court has adopted a rather strict view toward property owners in its takings analyses. It has adopted a test that there must be a denial of all economically viable use for there to be a taking, *Boise Cascade*, 935 P.2d at 420 (citing *Fifth Avenue Corp. v. Washington Co.*, 581 P.2d 50), and that there is ***no*** taking if "the owner has 'some substantial beneficial use' of the property remaining." *Boise Cascade*, 935 P.2d at 402 (citing *Dodd v. Hood River County*, 855 P.2d 608 (1993)).[12] For present purposes it should suffice to say that the rigidity of the Oregon court's tests makes it imperative that it adopt a reasonable approach toward defining the relevant parcel. It has.

In this case, the Oregon court noted that plaintiff had alleged "'depriv[ation] . . . of the only economically viable use of approximately 56 acres of merchantable timber.'" *Id.* The court held that the allegation, if it could be proved, was adequate to sustain a claim for a taking. *Id.* Thus the court segregated the 56 acres of owl habitat from the remaining 8 acres of harvestable timber and considered the timber on the 56 acres to be the relevant parcel. This is, of course, in contrast to the Michigan Supreme Court which refused to consider as the relevant parcel either the wetlands acres directly and permanently affected or the larger 55-acre parcel on which all use was temporarily sterilized.

As noted earlier, the Oregon Supreme Court's practice of looking at the particular property affected by a particular regulation was first adopted in *Fifth Avenue Corporation*. In that case, as expounded upon in *American Savings*, the court found that

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[12] While there may be problems with the nuance of the application of these tests, they are not germane to this petition. They will be germane, however, to a petition for writ of certiorari that this Court will be receiving in the near future in *Dodd v. Hood River County*, 1998 WL 57497 (9th Cir. 1998) (finding no taking after all residential use of a parcel with a fair market value of $33,000 was prohibited because a timber clear cut might yield $10,000).

"[f]or the purpose of the following [takings] discussion, ***we must divide the subject property into two separate parcels***" based on the county's regulation of the property. 581 P.2d at 60 (emphasis added).

These Oregon cases are in conflict with the Michigan Supreme Court's opinion.

B. The New Hampshire Supreme Court Has Recognized That There May Be Circumstances Where a Narrowly Focused "Relevant Parcel" Is Appropriate

In *Quirk v. Town of New Boston*, 663 A.2d 1328 (N.H. 1995), the New Hampshire Supreme Court had to decide whether the owner of a campground could assert a takings claim based on the establishment of a buffer zone on the exterior boundaries of the campsite. *Id.* at 1330-31. Ultimately the Court found there was no taking, and that the buffer zone could not be considered as a separate parcel. *Id.* 1333. The need for the buffer zone was created specifically by economic activities within the center of the property. *Id.* Furthermore, the stated justification of the buffer zone, to reduce noise emanating from the campsites, reflects a certain "use" of the property as a whole. That is, the buffer zone was being used as a noise filter for the camping activities.

What is noteworthy about the case in the context of this petition, however, is that court embraced a flexible approach to determining the relevant parcel: "Focusing on a discrete portion of a larger tract may be appropriate where the land owner has fragmented the property for distinct development or uses." *Id.* at 1332. Quite obviously, the Michigan court in contrast ignored the distinct development and uses of the four parcels in this case.

C. The New York Court of Appeals Has Adopted the Doctrine of "Conceptual Severance"

In *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. 1989), the New York Court of Appeals addressed a challenge to New York City's law regulating the

conversion of single-room occupancy housing. Ultimately, the court found the regulation was both a physical invasion taking and a nonphysical regulatory taking. 542 N.E.2d at 1062, 1065, 1078. In the context of determining whether the regulation was a regulatory taking, the court considered the nature of the relevant parcel.

The city suggested that the property owners could have no claim to a taking or denial of economically viable use after comparing the value of the rights affected by the law with the total "bundle" of the owners' property interests. 542 N.E.2d at 1067. The high court did not agree: "But the permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking." *Id.* The court elaborated by citing with favor "various comments on the theory of 'conceptual severance' [i.e., assessing only the value of the rights taken without regard to its relationship to the value of the whole property]." *Id.* (brackets in original). *Accord Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 398-400, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961 (1995) (finding the destruction of a reversionary interest to constitute a regulatory taking).

The conceptual severance issue in *Seawall*, of course, is not strictly identical to the Michigan Supreme Court's joining of properties in the horizontal or geographic sense. Nevertheless, the New York court's resolve to look at the actual impact of the regulation on a discrete property interest, rather than focusing on how the regulation affects an agglomeration of rights associated with a parcel, demonstrates the court's willingness to put substance over form. Michigan, on the other hand, did the opposite. It failed to focus on the actual property adversely affected by the regulation; it elevated form over substance when held that several discrete parcels must be fused together when considering whether the impact was great enough to constitute a taking.

D. California Has Adopted the Nuanced Approach of the Ninth Circuit

In several opinions over the past decade the intermediate California appellate courts have adopted the approach first utilized by Oregon in *Fifth Avenue* and by the Ninth Circuit in *American Savings*. The best exemplar of this trend is *Twain Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71 (1990), where the county had applied different zoning criteria to different portions of an 8.5-acre parcel. In a nutshell, after most of the 8.5-acre parcel had been developed, the county rezoned an undeveloped 1.7-acre plot from light commercial to open space. The owner sued for a taking. *Id.* at 79. The county argued that there was no economic deprivation and, accordingly no taking, because the "8.5-acre parcel has . . . undoubted monetary benefit" from the past development. *Id.* at 85.

The court did not agree. First it noted that "the nature of a particular land use regulation has been recognized as potentially creating separate parcels for 'taking' purposes." *Id.* (citing *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 495-96 (1982), *Nectow*, and *Fifth Avenue*. Also citing to *American Savings*, the court concluded:

> Accordingly, we decide the law does not demand the entire 8.5 acre parcel be treated as a whole in an "as applied" inverse condemnation analysis. . . . [Instead] it entails assessment of the potential for development of each of the differently zoned properties, from the standpoint of both site economics and government cooperation.

Id.

The court's point here is that by zoning different portions of the same parcel differently, it was the government that, for want of a better term, "subdivided" the parcel for regulatory purposes.

As noted in the discussion of *American Savings* and *Fifth Avenue*, the Michigan court stands far apart from the rest of the appellate courts, including California's, as they struggle to make sense of the "relevant parcel" issue.

III

WHILE THE COMMENTATORS DO NOT AGREE AMONG THEMSELVES AS TO THE APPROPRIATE MEASURE FOR THE RELEVANT PARCEL, THEY ALL AGREE THAT THIS COURT CAN RESOLVE THE CONFLICTS

Across the spectrum of commentators, from property rights hawks to property rights doves, there is little agreement as to what the appropriate measure of the relevant parcel should be. As with the lower courts, there are almost as many views as there are commentators. But there is one point on which all serious scholars can agree: this Court needs to create order out of the chaos.

Last year, environmental and land use scholar Professor Daniel R. Mandelker analyzed the relevant parcel question in Daniel R. Mandelker, *New Property Rights Under the Takings Clause*, 81 Marq. L. Rev. 9 (1997). In discussing the various currents in the relevant parcel debate, Mandelker fervently calls for an end to the segmentation of property by courts in takings analyses. He pointedly notes that "[s]egmentation remains, nevertheless, a troublesome problem that demands closer attention from the Court." *Id.* at 19. He concludes by calling for this Court to resolve the debate: "The Court needs to return to the hard, pragmatic, ethical question: when is it fair to ask owners of land to bear costs that society as a whole must accept." *Id.* While Petitioners are obviously not unhappy with the way many courts (other than Michigan's) have handled the issue, Petitioners agree that it is time for the Court to straighten out the doctrine (although not, of course, in the direction Mandelker suggests.)

In a particularly insightful commentary published in 1994, John Fee suggests the following test for defining the relevant parcel: "Any identifiable segment of land is a parcel for purposes of regulatory taking analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments." John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1534 (1994). If this test had been adopted in Michigan, for example, the court would first have looked at the 27 acres of wetlands and asked whether that land could have an economically viable use apart from any influence or utility deriving from the remainder of the property. If the answer is yes, then the affected property can be treated separately for takings purposes. A similar consideration would be appropriate for the 55-acre parcel. In contrast, a small buffer zone would rarely meet Fee's proposed test, thus limiting government liability in run of the mill buffer zone cases and minor regulatory actions.

Buttressing Petitioners' argument that only this Court can resolve the conflict, Fee suggests the source of the difficulty that courts have had with defining the relevant parcel: this Court "has thus failed to provide clear guidance to courts on the denominator question . . . it has failed to define 'parcel as a whole.'" *Id.* at 1545.

In another recent note Benjamin Barros weighs in with a discussion of the tension between utilitarian and libertarian interpretations of the Just Compensation Clause and concludes by advocating an embrace of the doctrine of conceptual severance. Benjamin D. Barros, *Defining "Property" in the Just Compensation Clause*, 63 Fordham L. Rev. 1853 (1995). The author notes at the outset, however, that: "Much of this confusion [over the Takings Clause] is caused by the failure of the Supreme Court to define the terms of the Just Compensation Clause." *Id.*

In his recent book, Professor Bernard Siegan criticizes this Court's decision in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), as being a source of much of the confusion. In that case, this Court found that leaving coal underground did not significantly affect economic interests. Siegan suggests, however: "Such an inquiry is wrong for two reasons: it makes the wealth of the owner a factor in takings jurisprudence, and it ignores the separable aspect of the coal company's subsurface rights." Bernard Siegan, *Property and Freedom* (Social Philosophy & Policy Center & Transaction Publishers) (1997) at 120. Siegan analogizes the taking of the coal to bank robbery: "Surely, if government seeks to confiscate someone's bank account, it cannot justify this action because the owner has many other accounts at the same bank. The wealth of the owner is not a relevant consideration in legally securing ownership . . . ." *Id.* Agree or disagree, the confusion found in the lower courts can only be clarified by this Court.

Finally, in the upcoming book, *The Takings Issue* by Dwight Merriam, Robert Meltz, and Richard Frank (Island Press, in press 1998), after noting the "disparate views" of the federal courts, the authors conclude:

> [There is] an inter-circuit conflict on a constitutional issue of considerable moment. Juxtaposition of the *Florida Rock* and *Clajon* decisions reflects a desultory fact of life for the planners, lawyers and decision-makers who labor in the land use vineyard: absent further clarification from the U.S. Supreme Court, it is difficult if not impossible to discern many of the applicable ground rules in regulatory takings law.

Advance excerpt reprinted in *Inverse Condemnation and Related Government* Liability, ALI-ABA Course of Study, American Law Institute (eds.) at 544 (1998).

IV

THIS COURT'S PRECEDENTS ARE IN CONFLICT WITH THE DECISION OF THE MICHIGAN SUPREME COURT

It is true that this Court's precedents have not yet provided the lower courts with the necessary guidance to tackle the relevant parcel question. Nevertheless, it is clear that the Michigan Supreme Court has strayed beyond the boundaries of what can be appropriately inferred from this Court's decisions.

A. Those Supreme Court Cases That Have Declined to "Segment" Property Are Not Relevant to This Case

It should first be noted that while there have been several cases where this Court has cautioned against segmenting property into inappropriately narrow strands, these cases are inapplicable where, as in the present case, the segments were treated differently by the regulatory agency, the ownership interests are not entirely identical, and where the regulation sterilizes all reasonable use of a discrete fraction of an otherwise economically useful portion of land. These cases do not address the horizontal segmentation of real property created by government regulation such as in the present case.

For example, in *Keystone Bituminous* (irrespective of Professor Siegan's comments), there was no issue of a horizontal segmentation (*e.g.*, into "wetlands" and "nonwetlands" categories). It was not suggested that the owners of the pillars of coal were not the same as the owners of the surrounding coal, and regulation did not take all of the coal deposits.

Penn Central is not relevant to this case. All of the terminal property was subject to the same zoning scheme. With respect to the "air rights" these rights were identical across the entire horizontal extent of the property.

In *Andrus v. Allard*, 444 U.S. 51 (1967) (prohibition on the sale of eagle feathers not a taking), this Court was examining a prohibition on a use of ***personal*** property in a case that has pretty much been confined to its facts. *See Hodel v. Irving*, 481 U.S. 704 (1987) (segmenting inheritance rights for takings purposes); *Babbitt v. Youpee*, 117 S. Ct. 727 (1997) (same).

Finally, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), where this Court declined to segment certain economic rights from others this Court was not dealing with real estate that had already been horizontally segmented by state regulation.

B. The Underlying Rationale Behind This Court's Takings Jurisprudence Calls for a Focused Analysis of the Regulation of Real Property Interests

As recently as 1994 this Court itself has suggested that this Court is in some way responsible for the confusion among the lower courts: "Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Lucas*, 505 U.S. at 1016 n.7. This Court, however, most certainly did not close the door upon an analysis that recognizes the impact upon the property caused by the regulation:

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id.

What is clear, however, is that this Court looked askance at the notion that a court should look at other holdings of the

owners. This Court labeled as "extreme" and "unsupportable" a New York court's "examin[ation of] the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity." *Id.* The New York court's practice of looking at other parcels in the vicinity of the one affected by a regulation is very similar to what the Michigan Supreme Court did in this case. As such, it is "extreme" and "unsupportable."

In any event based on the number of cases where this Court has embraced a takings analysis of less than the totality of all property interests possessed by an owner[13] it is important to note that such an approach is consistent with this Court's rationale behind the doctrine of physical invasion takings. This Court has long recognized that a physical invasion of real property, no matter how minute, must be treated as a categorical taking. *Kaiser Aetna*, 444 U.S. at 179-80, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40 (1982); *accord*, *Lucas*, 105 U.S. at 1014.

Furthermore, as Justice Brennan noted in *San Diego Gas and Electric v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting):

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property

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[13] *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (a partial taking in a temporal sense); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (intellectual property rights); *Kaiser Aetna v. United States*, 444 U.S. 164 (navigational rights); *Hodel v. Irving, supra* (inheritance rights); and *Babbitt v. Youpee, supra* (same); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (mineral and support estate rights).

> owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.

(Footnote omitted.)

To the Petitioners in the present case, it matters little to them whether the state had taken the 27-acre heart out of their property for a parking lot, an office building, or a toad farm, and it matters little to them if the state had deprived them temporarily of the use of the entire 55-acre parcel for a staging area for troops, for a temporary water retention basin, or for a spotted owl (or Michigan equivalent) sanctuary. The impact remains the same: it is no longer their property. For all practical purposes, the owners have been evicted. The state, not the owners, has dominion over the property. If a physical invasion of any scope can be a taking, then why not a regulatory action that totally destroys the use of an identifiable segment of land?[14]

CONCLUSION

The Kosiks and J.F.K. Company own 27 acres of wetlands on which the State of Michigan prohibits all use. It owns 55 acres on which the state denied all use until a trial court found that the state would be liable for a taking. Because, however, J.F.K. Company owns several other contiguous parcels, the Michigan Supreme Court held that the Kosiks and J.F.K. did not suffer a categorical taking. Instead, the trial court must factor J.F.K.'s other holdings into the "relevant parcel" for purposes of analyzing whether there has been a taking.

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[14] Both Siegan and Fee believe that Justice Brennan's dissent in *San Diego Gas & Electric* is pivotal to a better understanding of the relevant parcel problem. Seigan, *Property and Freedom* at 121-22. Fee, *Unearthing the Denominator*, 61 U. Chi. L. Rev. at 1562-63.

In addition to Michigan, at least three federal circuits and four states have attempted to resolve the question of what the relevant parcel should be in a takings analysis. Few of these analyses share much in the way of doctrinal consistency with one another. With one possible exception (the Tenth Circuit, although the facts of its case are rather unique), each one of these courts would have reached a different result with respect to Petitioners' property.

Virtually every commentator that has examined the relevant parcel issue agrees that the confusion in the lower courts is due to this Court's reluctance to address the issue head on. It is time for this Court to cast aside some of the miasmic confusion that reigns in the lower courts.

It is respectfully requested that this Court grant this petition for writ of certiorari in order to provide guidance to the courts, the regulated landowners, and the regulating agencies.

DATED: May, 1998.

Respectfully submitted,

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APPENDIX

Filed 3/24/98

K & K CONSTRUCTION, INC.,
J.F.K. COMPANY, and
RESORTS AND COMPANY,

Plaintiffs-Appellees,

v. No. 106712

DEPARTMENT OF NATURAL
RESOURCES,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH (except TAYLOR, J.).

CAVANAGH, J.

This case requires us to decide whether the denial of a permit to fill wetlands on the plaintiffs' property constitutes a regulatory taking of the property without just compensation. On two separate occasions, plaintiffs applied to the Department of Natural Resources for a permit to fill wetlands on a portion of their property so that they could commercially develop the land. Both permits were denied, and the plaintiffs filed the instant action, claiming that the permit denials constituted a regulatory taking of their land. The trial court found that the permit denials effectively rendered part of the plaintiffs' land worthless; therefore, the DNR was required to compensate the plaintiffs. The Court of Appeals affirmed. We granted leave, and we now reverse in part and remand the case to the trial court.

I

Plaintiffs J.F.K. Company and Resorts and Company own eighty-two acres of property near M-59 in Waterford Township. J.F.K. is a Michigan limited partnership, consisting of the five children of Joseph and Elaine Kosik. Resorts and Company is a Michigan copartnership, consisting of Wisconsin Resorts, Inc., and J.F.K. K & K Construction Co., Inc., is a Michigan

corporation. Mr. Kosik and his son are the sole shareholders of K & K. It has no ownership interest in the property, but it has contracted with the owners to build a C.J. Barrymore's restaurant and sports complex on the property.

Mr. and Mrs. Kosik originally acquired the property in question during 1976. The property was transferred to J.F.K. by quitclaim deed in 1986 so J.F.K. could develop the land. The Kosiks retained a reversionary interest in part of the property, conditioned upon J.F.K.'s ability to obtain financing for the project. Resorts and Company obtained its interest in the property about the same time.

The trial court found that the property consists of four defined parcels, all of which are contiguous. Parcel one consists of approximately fifty-five acres, twenty-seven acres of which are wetlands. It is zoned for commercial use.[1] Parcel two (sixteen acres) is directly south of parcel one. It contains a small portion of the wetlands. Parcel three (9.34 acres) is directly south of parcel two, and does not contain any wetlands. Parcel four (3.4 acres) borders the south side of parcel one, and the east side of parcel two. It is also free of wetlands. Parcels two, three, and four are zoned for multiple family residential housing (R-2). Parcel three has already been developed; parcels two and four have not been developed.

Plaintiffs' original plan, referred to as the "Barrymore Plan," was to build a restaurant and sports complex on forty-two acres of parcel one, and several multiple-family residential structures with a storm-water retention pond on parcels two and four. Pursuant to this plan, plaintiffs applied for a permit to fill part of parcel one in June 1988. The DNR denied the permit, finding that approximately twenty-eight acres of the property were

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[1] Two portions of parcel one have already been developed. The J.F.K. office building has been built on part of the parcel that borders North Oakland Boulevard, and a Ram's Horn restaurant has been developed and sold from a portion of the land that borders M-59.

protected wetlands under the Wetland Protection Act (WPA), MCL 281.701 *et seq.*; MSA 18.595(51) *et seq.*, since repealed and replaced. Plaintiffs did not file an administrative appeal. Instead, they filed the instant action in December 1988. In May 1990, plaintiffs submitted a second application for a permit to fill approximately three acres of wetland, while mitigating the fill by converting five acres of upland to wetland. This second application, referred to as the "Goga Plan," would have developed the primarily upland ring around the wetland, while leaving most of the wetland intact. The second permit was also denied, and again no administrative appeal was taken.

The case was tried in December 1991. The only issue before the court was whether the permit denials constituted takings of the plaintiffs' property. The trial court held that parcel one was the only property relevant to the taking analysis, and that denial of the permit to construct the restaurant and sports complex effectively rendered plaintiffs' property commercially worthless. The DNR was required to compensate plaintiffs for the full value of their property.

Once faced with a substantial adverse judgment, the DNR attempted to mitigate the loss in value of the property by allowing development to commence under the "Goga Plan."[2] Even so, the trial court held that the DNR owed plaintiffs

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[2] The trial court was required by statute to give defendant the option of mitigating its damages. MCL 324.30323; MSA 13A.30323 states that once the court has determined that the department's actions constitute a taking, the court shall order the department, at the department's option, to do one or more of the following:

> (a) Compensate the property owner for the full amount of the lost value.
>
> (b) Purchase the property in the public interest . . .
>
> (c) Modify its action or inaction with respect to the property so as to minimize the detrimental affect to the property's value.

damages both for a "temporary" taking of the land that could now be developed under the Goga Plan, and also for the full value of the wetlands that were not usable under the Goga Plan. The trial court ultimately decided that the DNR was liable for approximately $3.5 million plus interest for the unusable interior wetlands, and approximately $500,000, plus interest for the temporary taking. The Court of Appeals affirmed the trial court's judgment. 217 Mich App 56; 551 NW2d 413 (1996).

II

The Fifth Amendment of the United States Constitution provides in part: "nor shall private property be taken for public use, without just compensation."[3] Similarly, the Michigan Constitution provides:

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record. [Const 1963, art 10, § 2.]

The United States Supreme Court has recognized that the government may effectively "take" a person's property by overburdening that property with regulations. As stated by Justice Holmes, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922). While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an

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[3] The Fifth Amendment's Taking Clause is applied to the states through the Fourteenth Amendment. *Penn Central Transportation Co v New York City*, 438 US 104, 122; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

owner economically viable use of his land. *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987).

The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas*, *supra* at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." *Id.* at 1019 (emphasis in original). In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, 438 US 124.

The trial court found that the WPA had effectively eliminated the economically viable use of plaintiffs' land; therefore, plaintiffs were due compensation for a taking of their property. Significantly, the trial court only considered the effect of the regulations on parcel one of plaintiffs' property, finding that parcel one was the only relevant parcel for the taking analysis. The Court of Appeals upheld the award of damages to the plaintiffs for a taking. It held that the WPA eliminated all

economically viable use of the plaintiffs' land, which meant that plaintiffs could recover categorically for the taking under the United States Supreme Court's decision in *Lucas*.[4]

III

Before we decide whether the regulations imposed on plaintiffs' property constitute a taking, we must first address an important preliminary matter. The first step in our analysis is to determine which parcel or parcels owned by plaintiffs are relevant for the taking inquiry. The determination of what is referred to as the "denominator parcel" is important because it often affects the analysis of what economically viable uses remain for a person's property after the regulations are imposed. Plaintiffs urge us to focus our analysis only on parcel one, while defendant argues that we must look at all four of plaintiffs' parcels as a single unit.

One of the fundamental principles of taking jurisprudence is the "nonsegmentation" principle. This principle holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. *Keystone*, 480 US 498; *Korby v Redford Twp*, 348 Mich 193, 198; 82 NW2d 441 (1957). Courts should not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 US 130. Rather, we must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel.

The denominator parcel is also not limited to each parcel of property. As explained by the United States Court of Appeals

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[4] *Lucas* was decided only a few months before the trial judge issued his opinion in the instant case, and the opinion does not discuss the categorical-taking standard. However, the Court of Appeals found the categorical-taking analysis applicable on the basis of the trial court's findings.

for the Federal Circuit in *Tabb Lakes, Ltd v United States*, 10 F3d 796, 802 (CA Fed, 1993):

> Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority. [Citations omitted.]

This Court has previously found the nonsegmentation principle applicable to two adjoining parcels of property with unity of ownership. *Bevan v Brandon Twp*, 438 Mich 385; 475 NW2d 37 (1991). In *Bevan*, the plaintiffs purchased two contiguous lots of land separately. The plaintiffs were only allowed to build a single house on the two lots because of township land-use ordinances adopted after they had purchased the property. The plaintiffs sued, claiming that the regulations constituted an unconstitutional taking of their property. The lower courts agreed with them, finding that the regulation of the property constituted a regulatory taking of one of plaintiffs' two parcels. This Court reversed, stating:

> As a general rule, a person's property should be considered as a whole when deciding whether a regulatory taking has occurred. 1 Rathkopf, Zoning and Planning, § 6.07(5), p 6-45.
>
> * * *
>
> This Court has recognized that contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances, despite the owner's division of the property into separate, identifiable lots. [438 Mich 393, 395.]

The Court refused to apply the taking analysis to only one of the two lots; instead, it viewed the property "in its entirety." *Id.* at 397.

In the present case, the Court of Appeals noted that plaintiffs' parcels were contiguous, just as those in *Bevan.* However, the Court found *Bevan* distinguishable because the property in that case concerned two parcels under the same ownership and subject to a single-zoning scheme. 217 Mich App 65. While we recognize that this case is not factually the same as *Bevan*, the principles underlying the decision in *Bevan* require us to conclude that the denominator parcel is more than just parcel one of plaintiffs' property. The relevant denominator in this case includes at least parcels one, two, and four.

Determining the size of the denominator parcel is inherently a factual inquiry. As explained in *Ciampitti v United States*, 22 Cl Ct 310, 318-319 (1991):

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.

In this case it is neither realistic nor fair to consider only parcel one for purposes of the taking analysis. Parcels one, two, and four are bound together through their contiguity, the unity of J.F.K.'s ownership interest in all three of these parcels, and plaintiffs' proposed comprehensive development scheme. Thus, the Court of Appeals erred when it concluded that it was proper

for the trial court to consider only parcel one in the taking analysis.

First, there is no dispute that parcels one, two, and four are contiguous. Second, J.F.K. had an ownership interest in parcels one, two, and four. At the time the instant litigation was started, as well as when the permits were submitted to and denied by the DNR, J.F.K. was the title owner of all three parcels of property.[5] As explained in *Bevan*, contiguity and common ownership create a common thread tying these three parcels together for the purposes of the taking analysis.[6]

Third, the connection between parcels one, two, and four is further solidified by plaintiffs' comprehensive development plans. The plaintiffs' proposed use of the property is highly relevant to establishing the denominator parcel. Where "a property owner treats a series of properties as one income-producing unit, the value lost to the claimant is not simply the loss of the segregated parcel affected by the Government action," rather it is the

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[5] The trial court recognized the fact that J.F.K. is the titled property owner of parcel one. However, it found that there was an "equitable lien on the title to the property in favor of Mr. and Mrs. Kosik." At the very least, the record indicates that J.F.K. shares a joint ownership interest in the property with Mr. and Mrs. Kosik. We find this joint ownership interest, combined with the fact that J.F.K. was the sole titled owner of the property at the time that the alleged taking occurred, sufficient to create a common ownership interest in all of parcels one, two, and four.

[6] We acknowledge that these three parcels of property do have different zoning classifications. However, the fact that plaintiffs intended to use all three of them in a single development plan negates the fact that they were zoned differently, in this case. See *Zealy v City of Waukesha*, 201 Wis. 2d 365; 548 NW2d 528 (1996) (although zoning changes by the city resulted in three different zoning classifications on the plaintiff's parcel of land, the entire 10.4 acres of the parcel were considered relevant to the taking analysis rather than the 8.2 acres that were rezoned).

loss as it relates to the value of the entire unit. *Forest Properties, Inc v United States*, unpublished opinion of the United States Court of Federal Claims, issued August 6, 1997 (Docket No. 92-851L), p 36. Both permit applications filed by plaintiffs with the DNR contemplated a comprehensive development using part of parcels one, two, and four.[7] In a similar situation, the United States Court of Claims held that a plaintiff may not separate a certain lot of property from others that he owned with regard to his taking claim when he had previously treated them as "a single parcel for purposes of purchase and financing." *Ciampitti, supra* at 320. Indeed, it is inappropriate to allow a person to "sever the connection he forged when it assists in making a legal argument." *Id.* Here, the plaintiffs forged a connection between parcels one, two, and four through the proposed development scheme and permit applications.[8] It would be inappropriate to allow plaintiffs to sever this connection now that it makes their legal argument stronger.

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[7] The first permit filed with the DNR does not clearly state how many acres of plaintiffs' property were going to be involved in the development. However, there was testimony at trial explaining that along with the construction of the C.J. Barrymore's restaurant and sports complex on parcel one, plaintiffs planned on building a storm-water retention pond and multiple-family residential structures on parcels two and four. The second permit application also contemplated using parcels two and four as part of the development. It described the proposal as "development of a 72.2 acre parcel which includes commercial, general office, multiple housing and senior citizen congregate care facilities."

[8] Just as in the case at hand, the plaintiff's suit in *Forest Properties* was for the taking of 5.4 acres of lake bottom property when their permit application described the project as "53.36 acres existing plus 5.4 acres lake bottom." *Forest Properties* at 38. The Court of Claims found this as evidence of the unity of "development and the economic expectations" of the plaintiff. *Id.*

Finally, the reliance of the Court of Appeals on *Loveladies Harbor, Inc v United States*, 28 F3d 1171 (CA Fed, 1994), is misplaced. In *Loveladies*, the plaintiffs agreed to convey 38.5 acres of wetland to the state in return for a permit to develop the remaining 12.5 acres of their land. However, the plaintiffs were denied a federal permit to fill the 12.5 acres on the basis of the state's recommendation to the Army Corps of Engineers that the permit be denied. In the subsequent action, the defendants argued that the court should consider all fifty-one acres of the plaintiffs' property for the taking analysis, not just the 12.5 listed in the permit application. The court rejected the defendants' argument, explaining that it was illogical to "require *Loveladies* to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant as a charge against the givers." *Id.* at 1181. Similarly, it seems illogical in this case for J.F.K. to apply for permits to develop parcels one, two, and four, and then for the Court to consider only parcel one in the taking analysis.

We conclude that the lower courts erred in limiting their analysis of the taking claim to parcel one. In this case, the plaintiffs proposed a comprehensive development, using parts of parcels one, two, and four of the property. The taking claim is based on the DNR's refusal to issue permits to allow this comprehensive development. Thus, this case is analogous to *Bevan, supra*. At the least, all three of plaintiffs' parcels of property should be considered in the taking analysis.[9]

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[9] In this case, two parts of parcel one as originally purchased have been developed. Defendant argues that the trial court failed to consider these two parcels in its ruling on the value of parcel one, but it is unclear from the trial court's opinion whether this was the case. We see no reason for these two parts of parcel one to be excluded from the taking analysis. They were both part of parcel one as originally purchased, and neither was sold or developed before the enactment of the regulations in question. See *Blue Water Isles Co v DNR*, 171 Mich App 526, 536; 431 NW2d 53 (1988) (two parcels

(continued...)

We note that defendant has urged us also to include parcel three as part of the denominator parcel. Parcel three is contiguous with the other parcels in this case, and J.F.K. does have an ownership interest in parcel three. However, the record is unclear with respect to the extent of J.F.K.'s ownership interest in parcel three. More importantly, parcel three was not included in plaintiffs' development plan; it had previously been developed.

However, this should not end the inquiry. The failure to include a parcel of land in a development plan should not, by itself, exclude that parcel from consideration as part of the denominator. To so conclude would encourage piecemeal development. Thus, while we can safely state that the denominator parcel includes parcels one, two, and four, we believe it is inappropriate to conclude one way or the other with regard to parcel three. On remand, we instruct the trial court to determine the extent of J.F.K.'s ownership interest in parcel three, and whether it is sufficiently connected to the other parcels to conclude that all four parcels should be considered in the taking analysis.[10]

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[9] (...continued)
sold to a third party before regulatory action was considered in taking analysis).

[10] There is no single set of factors or "test" that the trial court should apply when determining the extent of the denominator parcel. Obviously the extent of plaintiffs' ownership interest in the relevant parcels, the contiguity of the parcels, and the extent to which the parcels have been treated as a single unit should all be considered. Some other factors that may be instructive include: whether the relevant parcels were part of the original parcel purchased, see *Ciampitti, Blue Water Isles Co,* and *Loveladies Harbor, supra*; the date of the parcels' purchase and the extent of development relative to the date of enactment of the challenged regulations, *Loveladies Harbor, supra*; and the zoning of the parcels, *Bevan, supra.*

IV

Next, we address the Court of Appeals conclusion that the regulation of plaintiffs' land constituted a regulatory taking. As explained in part II, a regulatory taking exists when: (1) the regulation fails to advance a legitimate state interest, or (2) the regulation denies an owner economically viable use of his land. This second type of taking is subdivided into: (a) a categorical taking, or (b) a taking recognized on the basis of the application of the traditional balancing test. Because plaintiffs concede that the state has a legitimate interest in protecting and preserving wetlands,[11] the first type of taking is not at issue. Thus, we limit our analysis to whether plaintiffs were deprived of economically viable use of their land, either by a categorical taking or under the balancing test.

A. Categorical Taking

When considering only parcel one, the Court of Appeals concluded that the regulation of plaintiffs' property constituted a categorical taking of their land. However, when we expand our consideration of plaintiffs' property to include at least all of parcels one, two, and four, it is clear that there was not a categorical taking of plaintiffs' property.

For a categorical taking to exist, there must be a denial of "all economically beneficial or productive use of land." *Lucas*, *supra* at 1015. In *Lucas*, the plaintiff purchased two lots of land approximately three hundred feet from a beach, with plans to build single-family houses on the property. A subsequent revision of South Carolina's Coastal Tidelands & Wetlands Act[12] thwarted the plaintiff's planned construction, and prevented him from developing the land in any way. This led the Court to

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[11] See *Harkings v Dep't of Natural Resources*, 206 Mich App 317, 324; 520 NW2d 653 (1994) ("the WPA unquestionably advances a legitimate state interest").

[12] SC Code, § 48-39-10 *et seq.*

conclude that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (emphasis in original). The fact that the property owner must be completely deprived of economically beneficial use of his property was emphasized in a footnote responding to Justice Stevens' dissent:

> Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post* at 1064. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. [*Penn Central*, 438 US 124.] [*Id.* at 1019, n 8.]

Unlike the property in *Lucas*, plaintiffs' land in the present case was not left economically idle. In *Lucas*, the plaintiff was completely prohibited from developing any part of his land. Here, however, plaintiffs were not prohibited from developing the remaining upland on parcel one, as well as almost all of parcels two and four. Indeed, plaintiffs' second permit application clearly contemplated such development. While the commercial value of the land may have been reduced by the

restrictions placed on it by the WPA, it was not rendered worthless or economically idle.[13]

B. The Balancing Analysis

As *Lucas* indicates, regulations that do not rise to the level of a categorical taking may still be so burdensome as to rise to the level of a taking. *Id.* at 1019-1020, n 8. Therefore, plaintiffs must prove a taking on the basis of the balancing analysis. As explained in part II, this requires an "ad hoc, factual inquir[y]" into three factors: (1) the character of the governmental action, (2) the economic effect of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations. *Penn Central* at 124. While there is no set formula for determining when a taking has occurred under this test, it is at least "clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains." *Bevan*, 438 Mich 391, citing *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 497.

In the present case, the trial court made several findings of fact with regard to the economic effect of the WPA on parcel one. However, it failed to take into consideration the value of the property when it included parcels two and four. We do not know the value of all three parcels combined, either with or without the regulations. It would be imprudent to decide whether there was a taking of plaintiffs' property on the basis of

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[13] Even if we did limit our analysis to parcel one, the Court of Appeals conclusion that a categorical taking had occurred is not supported by the record. In its first opinion, the trial court stated: "While it is true that *some financial value will remain*, this Court finds that what little economic value remains is but a small fraction of the economic value the property would have if all of it could be developed." (Emphasis added.) Thus, while the regulations may have diminished the value of plaintiffs' land, this diminution in value would not give rise to a categorical taking. Instead, it should be analyzed under the traditional case-specific inquiry.

an inadequate record. Therefore, we reverse the decision of the Court of Appeals, and remand the matter to the trial court for further consideration. On remand, the trial court should compare the value removed from the plaintiffs' land, and also calculate what value remains. It then must reevaluate the case under the three-part balancing test.

V

The decision of the Court of Appeals is reversed and the case is remanded to the trial court. On remand, the trial court must determine (1) if parcel three of plaintiffs' property should be included in the denominator parcel, and (2) whether the effect of the regulations on the entire denominator parcel resulted in a taking under the balancing test.

MALLETT, C.J., and BRICKLEY, BOYLE, WEAVER, and KELLY, JJ., concurred with CAVANAGH, J.

K & K Construction, Inc, v Dep't of Natural Resources

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Amici Curiae:

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49503] [(616) 459-6168]; *John D. Echeverria* and *Enrico G. Nardone*, of counsel [1901 Pennsylvania Ave., NW, Washington, D.C. 20006] [(202) 861-2242], for Michigan Audubon Society, Detroit Audubon Society, and National Audubon Society.

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Appendix B-1

Filed 6/4/96

K & K CONSTRUCTION, INC. v. DEPARTMENT OF NATURAL RESOURCES

Docket No. No. 168393. Submitted December 13, 1995, at Lansing. Decided June 4, 1996, at 9:00 a.m. Leave to appeal sought.

LC No. 88-012120-CM.

DISPOSITION: Affirmed.

COUNSEL: Robert L. Bunting and Karen Russell, for the plaintiffs. Oxford, Mt. Clemens.

Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, A. Michael Leffler and Kevin T. Smith, Assistant Attorneys General, for the defendant.

Amicus Curiae:

Dickinson, Wright, Moon, Van Dusen & Freeman (by Gregory L. McClelland, David E. Pierson, and Jeffery V. Stuckey), for Michigan Association of Home Builders. Lansing.

JUDGES: Before: Jansen, P.J., and Taylor and J.P. Noecker,* JJ.

OPINION BY: Kathleen Jansen

OPINION:

JANSEN, P.J.

This is a regulatory takings case. Defendant Department of Natural Resources appeals as of right from a September 8, 1993, judgment of the Court of Claims in plaintiffs' favor. The Court of Claims determined that a taking had occurred as a result of defendant's decision to deny plaintiffs' application for a permit to build a restaurant on a parcel of land on the basis that the land

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* Circuit judge, sitting on the Court of Appeals by assignment.

was protected wetlands. The Court of Claims awarded $3,245,256 for the property taken, plus interest of $1,574,522.60, and $ 459,400 for a temporary taking of part of the land. We affirm.

I

Plaintiffs own approximately eighty-two acres of property in Waterford Township in Oakland County. The property was acquired in 1976 by Joseph and Elaine Kosik. J.F.K. Company is a Michigan limited partnership consisting of the five children of the Kosiks. J.F.K. Company is a part owner of the property through a quit-claim deed executed by the Kosiks. K & K Construction is a Michigan corporation, of which Joseph Kosik and one of his sons are the sole shareholders. K & K Construction has no ownership interest in the property involved in this case. Resorts and Company is a Michigan copartnership and is a part owner of the eighty-two-acre property.

The Court of Claims concluded that the property consisted of four distinct parcels. The parcel at issue was parcel 1, on which J.F.K. Company wished to build a C.J. Barrymore's Restaurant. Parcel 1 covered approximately fifty-five acres of the entire property. On May 28, 1988, plaintiffs applied for a permit to develop the property on November 7, 1988, defendant denied the permit on the basis of a determination that approximately twenty-eight acres of the property was protected wetlands under the Wetland Protection Act (WPA), MCL 281.701 et seq.; MSA 18.595(51) et seq.

Plaintiffs then filed the present action on December 29, 1988, in the Court of Claims. Plaintiffs initially sought a declaratory ruling that the area is not wetlands and also sought injunctive relief against defendant's enforcement of the WPA and damages under the WPA. Plaintiffs sought a determination that defendant's actions constituted a taking of their property for which they were entitled to just compensation. On May 1, 1990, plaintiffs submitted a second application for a permit to fill

approximately 3.17 acres of wetlands and to convert 5.36 acres of upland to wetlands. This plan was known as the "Goga Plan" and involved a total of over seventy-two acres of property on parcels 1, 2, and 4. This second application was also denied on July 26, 1990.

Trial was held before the Court of Claims, sitting as the factfinder, on December 17, 1991. The only issue before the court was whether there was a taking because of the permit denial such that plaintiffs were entitled to just compensation. On November 2, 1992, the Court of Claims issued its opinion and order determining that a taking occurred because the wetlands restrictions rendered the property essentially worthless as commercial real estate, and that plaintiffs were therefore entitled to just compensation. After various postjudgment motions and consideration of the Goga Plan, the Court of Claims awarded a total of $ 5,279,178 in favor of plaintiffs.

II

Plaintiffs contend that defendant's actions of denying the permit to fill the wetlands constitute an unconstitutional taking of property without just compensation. The Fifth Amendment of the United States Constitution provides in part: "nor shall private property be taken for public use, without just compensation." Similarly, the Michigan Constitution provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. The Takings Clause of the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment. *Dolan v City of Tigard*, 512 U.S. __; 114 S. Ct. 2309; 129 L. Ed. 2d 304, 315 (1994); *Peterman v Dep't of Natural Resources*, 446 Mich. 177, 184, n 10; 521 N.W.2d 499 (1994).

A

Property may be taken only when an essential nexus exists between a legitimate state interest and the taking. If the nexus

exists, then there must be a "rough proportionality" between the manner of the taking and the actual state interest involved. *Dolan, supra*, p 317; Peterman, supra, p 201. The parties do not dispute that the state has a legitimate interest in preserving and protecting wetlands. *See Attorney General ex rel Dep't of Natural Resources v Huron Co Rd Comm'n*, 212 Mich. App. 510, 516; 538 N.W.2d 68 (1995) ("the primary purpose of the WPA is to ensure that wetland habitats are preserved and protected"). Further, there is no dispute that an essential nexus exists between the legitimate state interest in this case (the preservation and protection of wetlands) and the taking (the land-use regulation). *See Harkins v Dep't of Natural Resources*, 206 Mich. App. 317, 324; 520 N.W.2d 653 (1994) ("the WPA unquestionably advances a legitimate state interest"). The crucial issue we face is whether there is a taking within the meaning of the Fifth Amendment to require just compensation.

The United States Supreme Court has explained that the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of the owner's land. *Lucas v South Carolina Coastal Coastal*, 505 U.S. 1003, 1015; 112 S. Ct. 2886; 120 L. Ed. 2d 798 (1992). In land-use regulation cases, it has been recognized that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking. *Id.*, p 1014; *Volkema v Dep't of Natural Resources*, 214 Mich. App. 66, 69; 542 N.W.2d 282 (1995). The Supreme Court has not set a formula regarding what constitutes going "too far," but has engaged in ad hoc factual inquiries. *Lucas, supra*, p 1015.

However, there are two distinct categories of regulatory action that require compensation without case-specific inquiry. The first category encompasses regulations that compel the property owner to suffer a physical invasion of the property.

The second category is where regulation denies all economically beneficial or productive use of the land. *Id.*, pp 1015-1019. The

Court of Claims concluded that application of the WPA denied plaintiffs all economically beneficial or productive use of the land.

The United States Supreme Court has noted that "affirmatively supporting a compensation requirement . . . [are] regulations that leave the owner of land without economically beneficial or productive options for its use--typically by requiring land to be left substantially in its natural state." *Id.*, p 1018. In Lucas, the Court held that where the state seeks to sustain regulation that deprives property of all economically beneficial use, the state may resist compensation only if an inquiry into the nature of the owner's property shows that the interests behind the proscribed use were not part of the title to begin with. *Id.*, p 1027. Thus, a regulation that prohibits all economically beneficial use of land cannot be newly legislated or decreed without compensation, but must inhere in the owner's title itself, with the restriction that background principles of state property or nuisance law may already place on land ownership. *Id.*, pp 1028-1029.

In the case before us, we reject defendant's claim that the permit denial was based on a fundamental principle of Michigan property law. Defendant claims that such a principle is found in our state constitution:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Const 1963, art 4, § 52.]

In *Lucas*, the Supreme Court made clear that the state must do more than proffer the legislatures declaration that the uses the landowner desires are inconsistent with the public interest. Rather, the state must identify background principles of nuisance and property law that prohibit the uses the landowner intends in

the circumstances in which the property is found. *Lucas, supra*, pp 1030-1031.

The constitutional provision quoted above is not a principle of nuisance and property law. The decision to build a restaurant on land, or a request to fill in wetlands, does not constitute a nuisance that the government may abate. See *id.*, p 1029; *Miller Bros v Dep't of Natural Resources*, 203 Mich. App. 674, 682; 513 N.W.2d 217 (1994). We are not aware of any common-law principle preventing the building of a restaurant on plaintiffs' land. Thus, the generalized invocation of public interests in the state constitution, and the Legislature's declarations in the WPA and the Michigan Environmental Protection Act, MCL 691.1201 et seq.; MSA 14.528(201) *et seq.*, do not constitute background principles of nuisance and property law sufficient to prohibit the use of plaintiffs' land without just compensation.

B

Defendant also contends that because the regulation, the WPA, was enacted before the quit-claim deed passed title to J.F.K. Company, plaintiffs are precluded from compensation. We do not agree that the timing of the regulation and ownership would act to preclude just compensation where it would otherwise be due. *See Nollan v. California Coastal Comm*, 483 U.S. 825, 833, n 2; 107 S. Ct. 3141; 97 L. Ed. 2d 677 (1987) (The landowners' rights were not altered because they acquired the land well after the commission had begun to implement its policy. As long as the commission could not have deprived the prior owners of the easement without compensation, the prior owners must be understood to have transferred their full property rights in conveying the lot.)

In this case, the property was acquired by Joseph and Elaine Kosik in 1976. They transferred the property through a quit-claim deed to J.F.K. Company in 1986. The WPA took effect in 1980. The passage of the WPA cannot be understood as depriving J.F.K. Company of just compensation merely because

the WPA was in effect when the quit-claim deed was executed. Because we have concluded that the interests served by the proscribed use in this case do not inhere in the title itself, the timing of the regulation and the transfer of the land do not dictate that plaintiffs are not entitled to just compensation. *Lucas*, *supra*, pp 1027-1031.

C

Next, in order to determine if plaintiffs were deprived of all economically beneficial or productive use of their land, we must decide what specific property was affected by the permit denial. It is defendant's contention that the Court of Claims should have considered all eighty-two acres of the property in determining whether a taking occurred in this case. At trial, plaintiffs argued that the Court of Claims should consider only the twenty-eight acres that were declared to be wetlands. The Court of Claims rejected both contentions and found that it would consider the fifty-five acres designated as parcel 1. On appeal, plaintiffs urge us to affirm the Court of Claims' ruling. We find that the Court of Claims' factual finding in this regard is not clearly erroneous. MCR 2.613(C).

A proper resolution of this issue is not subject to any clear rule. In *Bevan v Brandon Twp*, 438 Mich. 385, 393; 475 N.W.2d 37 (1991), our Supreme Court held that a person's property generally should be considered as a whole when deciding whether a regulatory taking has occurred. In *Bevan*, however, the property in question consisted of two contiguous parcels under the same ownership and subject to a single zoning scheme. In the case before us, parcel 1 is zoned for commercial use, while parcels 2, 3, and 4 are zoned for residential use. Further, there is no single owner of all four parcels. Parcel 1 is owned in part by J.F.K. Company, and parcels 2 and 4 are owned solely by J.F.K. Company. Parcel 3 is owned by both J.F.K. Company and Resorts and Company. Finally, the regulation in this case does not affect all four parcels. Only parcel 1 is affected by the WPA.

More recently, this Court relied on *Loveladies Harbor, Inc v United States*, 28 F.3d 1171 (CA Fed, 1994), in analyzing a similar issue See *Volkema, supra*, pp 71-72. In Loveladies Harbor, the plaintiffs originally owned 250 acres of land that had been acquired in 1958. By 1972, 199 acres of the land had been developed, before the enactment of § 404 of the Clean Water Act. 33 USC 1344. The plaintiffs sought a fill permit to develop the remaining fifty-one acres for residential use. The permit was initially denied, but the stale eventually entered into an agreement whereby the plaintiffs could develop 12.5 acres of the land. However, the plaintiffs also had to seek permit approval from the Army Corps of Engineers. The corps ultimately denied the permit.

The court in *Loveladies Harbor* had to determine the "denominator parcel" in order to determine whether a taking had occurred. The court rejected any bright-line rule and instead adopted a flexible approach to account for factual nuances of each individual case. *Loveladies Harbor, supra*, p 1181. This approach was also recently adopted by this Court in *Volkema, supra*, p 73. The court in *Loveladies Harbor*, found that the 199 acres that had been developed before enactment of § 404 of the Clean Water Act should not be considered as part of the denominator because no effort had been made by the state to regulate that land. With regard to the remaining fifty-one acres, the court found that the 38.5 acres had been essentially given to the state in exchange for the permit to develop the remaining 12.5 acres. The court refused to include the 38.5 acres as part of the denominator because that land had no value to the plaintiffs. Thus, the court concluded that only 12.5 acres would be considered as the denominator, and that because the value was de minimis, the owner was deprived of all economically feasible use of the property and was entitled to just compensation. *Loveladies Harbor supra*, pp 1181-1182.

In *Volkema*, this Court employed the same "factual nuances" analysis, but reached a different conclusion. The

plaintiffs in *Volkema* bought forty-five acres of commercial property in 1963 and a contiguous five-acre parcel in 1979. The plaintiffs developed the property and were left with 24.6 acres at the time of the litigation. The plaintiffs sought a permit to fill 4.3 acres of wetlands, but that permit was denied. The plaintiffs sought compensation for the six acres they claimed were rendered useless because of the denial of the fill permit.

This Court held that it would not include the entire forty-five acres in the denominator because approximately half of that land was developed before enactment of the WPA. However, this Court held that it would consider the remaining 24.6 acres as the denominator, rather than the six acres as urged by the plaintiffs. In *Volkema*, the entire 24.6 acres was of high value to the plaintiffs, and the land, when viewed as a whole, continued to have substantial value because it could still be developed for commercial purposes. Thus, this Court concluded that the plaintiffs had suffered no taking where most of the land could be developed for commercial purposes. *Volkema, supra*, p 74.

In the present case, the Court of Claims properly considered only the fifty-five acres of parcel 1. Parcels 2, 3, and 4 are zoned for residential purposes, while parcel 1 is zoned for commercial uses. Parcel 3 was developed before plaintiffs first applied for the permit. Parcels 2 and 4 are not developed. Because of the differences in the zoning of the four parcels and the differences in their ownership, we conclude that the Court of Claims' factual finding that the fifty-five acres should be considered as the denominator is not clearly erroneous.

D

Defendant next contends, however, that even in light of the regulation, there was no taking because the property retained significant value. The Court of Claims found that parcel 1, as affected by the permit denial, was essentially worthless as commercial real estate. This factual finding is not clearly erroneous, given the evidence presented at trial.

The Court of Claims credited the testimony of plaintiffs' experts, who concluded that the property was essentially worthless. The Court of Claims discounted the conclusion of defendant's expert that the edges of the parcel could still be developed, because that conclusion was refuted by plaintiffs' experts. We note that the twenty-eight acres of wetlands is irregularly shaped within the fifty-five-acre parcel. Thus, it is not possible to simply leave the wetlands area undeveloped and build on the remaining twenty-seven acres. If the twenty-eight acres of wetlands was not developed, the only area that could be feasibly developed would be the edges of the area of parcel 1. This was apparently not economically feasible because of the land needs for a restaurant, including parking lots or any other commercially viable use. Thus, this case is unlike Volkema because there the plaintiffs could still use the remaining eighteen acres of over twenty-four acres of property. Here, the plaintiffs could not develop the remaining twenty-seven acres because of the configuration of the wetlands within the parcel.

Accordingly, the Court of Claims did not err in concluding that the regulation in this case denied the owners all economically beneficial or productive use of the land. Thus, a taking occurred within the meaning of the Fifth Amendment and plaintiffs were entitled to just compensation for the fifty-five acres of land affected by the regulation.

III

Defendant next argues that the Court of Claims erred in rejecting its option to cure the taking by permitting implementation of the Goga Plan.

Plaintiffs first submitted an application on May 28, 1988, regarding development of parcel 1. On November 7, 1988, defendant denied a permit to develop the property because twenty-eight acres of the parcel were determined to be protected wetlands. Plaintiffs then filed their complaint on December 29, 1988. Thereafter, William Goga, a civil engineer retained by

plaintiffs, developed a mitigation plan. He proposed that some wetlands be filled in parcel 1, but that wetlands could be created in the parcel from nonwetlands area. This plan was submitted to defendant in April 1990. Defendant rejected this plan and denied the subsequent permit application based on Goga's plan in July 1990.

Trial in this matter was held on December 17, 1991. On November 5, 1992, the Court of Claims issued an opinion and order in which it found that a taking had occurred because plaintiffs were denied all economically beneficial or productive use of the land because of the permit denial. It was not until after this determination that defendant agreed to accept the Goga Plan. The Court of Claims issued a second opinion and order, dated May 4, 1993, which mainly dealt with various compensation issues. The Court of Claims specifically found that defendant was entitled to accept the Goga Plan pursuant to MCL 281.721(3)(c); MSA 18.595(71)(3)(c). This provision specifically allowed defendant to modify its action so as to minimize the detrimental effect to the property's value after the court determined that defendant's action constituted a taking. The Court of Claims found no objection to this approach. The Court of Claims then stated that those portions of the property defined as being part of the Goga Plan could be exempted from the taking, while those portions that were to be transformed into wetlands would be considered to be condemned.

In considering what constituted just compensation, the Court of Claims ruled that plaintiffs would be awarded interest and fair market value of the portion of land actually condemned. The court specifically did not include that portion of the land that could still be commercially developed under the Goga Plan. Thus, defendant's characterization of the Court of Claims' action as being a rejection of defendant's decision to accept the Goga Plan is not supported by the record.

Further, we cannot agree with defendant's contention that its decision to offer a permit for the Goga Plan eliminates the

taking the Court of Claims found, and we agree, that there was an unconstitutional taking in this case due to the regulation of the wetlands area. It was not until after a finding by the Court of Claims that defendant decided to accept implementation of the Goga Plan. However, this action does not eliminate a taking. As the Court of Claims correctly determined, twenty-seven acres of the parcel were temporarily taken and twenty-eight acres were permanently taken.

In *First English Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 U.S. 304, 321; 107 S. Ct. 2378; 96 L. Ed. 2d 250 (1987), the Supreme Court held that where the government's activities have created a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Such "temporary takings" are also entitled to just compensation.

Therefore, we find that the Court of Claims did not err in awarding compensation. The court properly found that there was a temporary taking concerning part of the land and a permanent taking concerning the remaining portion of the land. Thus, the court's order awarding compensation complied with MCL 281.721(4); MSA 18.595(71)(4) in that it found a temporary taking concerning part of the land that could be developed under the Goga Plan.

IV

Next, defendant contends that the trial court erred in finding MCL 281.721(4); MSA 18.595(71)(4) unconstitutional in that it violated the Just Compensation Clauses of the Fifth Amendment and Const 1963, art 10, § 2.

The Court of Claims did not err in finding that § 21(4) is unconstitutional because it limits plaintiffs' recovery to twice the state equalized value of the property taken. Both the federal and state constitutions provide that private property cannot be taken for public use without just compensation. Just compensation

means the full monetary equivalent of the property taken. *Almota Farmers Elevator & Warehouse Co v United States*, 409 U.S. 470, 473; 93 S. Ct. 791; 35 L. Ed. 2d 1 (1973). Just compensation is that amount that places a property owner in a condition as good as the owner would have been had the taking not occurred. *Id; Oakland Hills Development Corp v Lueders Drainage District*, 212 Mich. App. 284, 292-293; 537 N.W.2d 258 (1995).

The determination of the measure of just compensation for a taking is a judicial, not a legislative, question. *United States v Sioux Nation of Indians*, 448 U.S. 371, 417, n 30; 100 S. Ct. 2716; 65 L. Ed. 2d 844 (1980), citing *Monongahela Navigation Co v United States*, 148 U.S. 312, 327; 13 S. Ct. 622; 37 L. Ed. 463 (1893). Because the determination of the proper measure of compensation for a taking is solely a judicial question, the Legislature may not restrict the measure of just compensation in a takings case. *Baltimore & O R Co v United States*, 298 U.S. 349, 368; 56 S. Ct. 797; 80 L. Ed. 1209 (1936). Thus, statutes that set forth the compensation rate for a taking, such as MCL 281.721(4); MSA 18.595(71)(4), are unconstitutional. *See Baltimore & O R Co, supra; Monongahela, supra.*

Because MCL 281.721(4); MSA 18.595(71)(4) mandates the method of computing just compensation for a taking, the Court of Claims correctly held that it is unconstitutional.

V

Last, defendant argues that the Court of Claims awarded excessive damages for the taking. We disagree.

The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. *Miller Bros, supra*, p 685. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense. *Id* There is no formula or artificial measure of damages applicable to all condemnation cases. The amount of damages to be recovered by the property owner is generally left to the

discretion of the trier of fact after consideration of the evidence presented. *Poirier v Grand Blanc Twp* (After Remand), 192 Mich. App. 539, 543; 481 N.W.2d 762 (1992).

In avoiding a windfall to the property owner, the nature of the taking must be considered. Where there is a temporary taking, the just compensation awarded must reflect its temporary nature. *Miller Bros, supra*, p 687. This Court has recognized that money damages are recoverable for a temporary, unconstitutional taking. Courts should engage in a flexible approach in determining compensation for a temporary taking. Some factors to consider are: rental return, option price, interest on lost profit, before and after valuation, and benefit to the government. *Poirer, supra*, pp 544-545.

The Court of Claims awarded $3,245,256 and interest of $1,574,522.60 for the property taken. The Court of Claims also awarded $459,400 for the temporary taking of the property. The court's award of damages is based on the evidence presented and does not appear to be an abuse of discretion. In this case, because of the difficulty in determining the fair market value of the land with the use restrictions placed on it, the court appears to have engaged in a flexible approach in computing damages. Defendant has not shown that the Court of Claims' computation of damages was erroneous or excessive.

Affirmed.

/s/ Kathleen Jansen

/s/ Clifford W. Taylor

/s/ James P. Noecker

Appendix C-1

Filed 9/9/93

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

K & K CONSTRUCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY, a Michigan Corporation,

Plaintiffs,

vs

Case No.: 88-12120-CM
HON. WILLIAM COLLETTE

THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES and STATE OF MICHIGAN,

Defendants.
_____/

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Appendix C-2

FINAL JUDGMENT AND AWARD OF DAMAGES TO PLAINTIFFS AGAINST DEFENDANTS DNR AND STATE OF MICHIGAN AND AWARDING COSTS AND ATTORNEY FEES

At a session of said Court held in the City of Lansing, said County and State on _____.

PRESENT: HON._____
WILLIAM COLLETTE

The Court being duly advised in the premises after trial on the merits of the above entitled cause, submission of briefs, responsive briefs and reply briefs together with exhibits and stipulations and being persuaded thereby;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs are awarded judgment in that their property interest have been condemned by the application of the Wetlands Preservation Act and there has been both a complete taking and interim taking entitling Plaintiffs to just compensation accordingly.

IT IS FURTHER ORDERED AND ADJUDGED that the statutory limit on just compensation payable to owners of property condemned is hereby declared unconstitutional and held for naught as it is solely the province of the Court to determine just compensation under the United States and Michigan Constitutions.

IT IS FURTHER ORDERED AND ADJUDGED that the Court recognizes from the pleadings, evidence and arguments made in this case together with the various stipulations entered into between the parties that good faith efforts were made to resolve portions of the above entitled case which resulted in a plan prepared that allowed for the limited commercial development of some of the perimeter of Plaintiffs' property which plan

is known as the "Goga Plan". Defendants are now conceding to Plaintiffs the right to develop and/or sell that limited portion of the property which reduces the award to the Plaintiffs as not all the property would be condemned while at the same time fulfilling the intent of the Wetland Protection Act to minimize the impact on future growth on a valuable resource. Plaintiffs shall have the right to develop and/or sell the Goga Plan property and a permit ***shall*** issue ***within 30 days*** therefore ***pursuant to Exhibit*** __ consistent with the Goga Plan and this Court retains exclusive jurisdiction over any issues arising therefrom.

IT IS HEREBY ORDERED AND ADJUDGED that the fair market value under a taking analysis awards plaintiffs $5,941,181.00 for the entire parcel consisting of 52.67 acres which total acreage and damage calculation is agreed upon by the parties. This entire tract and award is reduced by the amount of acreage in the Goga Plan agreed upon by the parties as 23.9 acres leaving a balance of 28.77 acres as the total acreage which has been condemned by a takings by the Defendants, said calculation agreed upon by the parties after reference to the surveys of the property involved.

THEREFORE, IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs award shall be reduced accordingly and they shall recover the percentage of the $5,941,181.00 divided by the total acreage of 52.67 acres resulting in a net award of $3,245,256.00 of the taken 28.77 acres of property by condemnation, plus $1,574,522.60 in interest through June 30, 1993.

IT IS FURTHER ORDERED AND ADJUDGED that the Court finds that Plaintiffs loss the use of the "Goga" property for several years back to November 12, 1988 which loss is determined to be an interim taking with a damage award based on the testimony and evidence as $106,635.00 annually when adjusted to the Goga property alone, a figure computed and agreed upon as the proper computation by the parties. Therefore, Plaintiffs are awarded an interim taking damage award of $459,400.00

including interest through June 30, 1993, on the interim taking of the Goga Plan property for a total award of damages and interest through June 30, 1993 of $5,279,178.00.

IT IS FURTHER ORDERED AND ADJUDGED that in light on this Court's determination that Defendants took and must compensate Plaintiffs for the taking of 28.77 acres, title to the 28.77 acres is vested in Defendants, subject to Plaintiffs' right to use 5.359 acres of the 28.77 acre parcel for wetland mitigation as set forth in the Goga Plan presented to the Court.

IT IS HEREBY ORDERED AND ADJUDGED that the interior 28.77 acre property as described in Trial Exhibit A and A-2 is conveyed pursuant to order of this Court and Circuit Court Deed to Defendants as of November 12, 1988 subject to the right of mitigation vested in Plaintiffs pursuant to the Goga Plan. This judgment is deemed recordable in the chain of title and Plaintiffs shall execute a Quit Claim Deed accordingly conveying the interior 28.77 acres only with the right of mitigation under the Goga Plan.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs are awarded their costs in the amount of $10,075 which is awarded to Plaintiffs after review by opposing counsel in addition to the award on damages against Defendants, State of Michigan and DNR.

IT IS FURTHER ORDERED AND ADJUDGED that the Court is cognizant that Plaintiffs retained their attorney under a one-third contingency agreement should the matter proceed to trial; the Court declines to award a one-third attorney fee in the above entitled case given the status of current case law and limits Plaintiffs award for attorney fees to reasonable attorney fees under the Mediation Rule. The Court finds a reasonable fee given the complexity of the case, diligence of counsel and complexity of issues involved as the hourly rate of $185.00 an hour for 380 hours which amount is based upon prior review by opposing counsel since the date of the acceptance\rejection

period of mediation for a total award of $70,300.00 in attorney fees sustained in this cause pursuant to the mediation rule and awards the same as part of this judgment together with judgment interest on the entire award excluding fees and costs running from July 1, 1993 onward.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants' Motion for Entry of Judgment, dated December 4, 1992, is denied.

IT IS FURTHER ORDERED AND ADJUDGED that while both counsel have cooperated in referencing detailed exhibits and surveys to accurately compute the acreage and damages awarded by this Court, the Attorney General preserves all of its appellate rights on the result reached by this Court.

/s/ WILLIAM E. COLLETTE
HONORABLE WILLIAM COLLETTE

APPROVED AS TO FORM
WITH NOTICE OF ENTRY WAIVED:

/s/ ROBERT L. BUNTING *w/change pg 3**
ROBERT L. BUNTING (P-24212)
Attorney for Plaintiffs

/s/ KEVIN T. SMITH *w/change on pg 3*
KEVIN T. SMITH (P-32825)
Assistant Attorney General
Attorney for Defendants

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* [Changes marked with bold and italics.]

Appendix D-1

Filed 5/4/93

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

K & K CONSTRUCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY, a Michigan corporation,	File No. 88-12120-CM
Plaintiffs,	Hon. William E. Collette
v.	**OPINION AND ORDER**
THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND STATE OF MICHIGAN,	
Defendants.	

Previously, this Court determined that the property of Plaintiffs has been condemned by the actions of the Defendants in declaring a substantial portion of it to be a wetland protected under the Goamaere-Anderson Wetland Protection Act, MCLA 281.701, *et seq*. This Court ruled that damages suffered by Plaintiffs cannot exceed twice the state equalized evaluation (SEV) pursuant to MCLA 281.721(4).

This Court also allowed the Defendants the option of issuing a waiver of all or a portion of the designation in lieu of compensation, pursuant to MCLA 281.721(3)(C). The following questions are presented for consideration by the Court in this supplementary opinion.

Appendix D-2

1. Is MCLA 281.721(4) unconstitutional in that it limits compensation for a taking to twice the SEV, rather than the fair market value of the property?

2. May the Defendants issue a "waiver" for a portion of the property and thus minimize the taking and resultant expense?

3. If the Court permits the partial waiver, what amount, if any, will fairly compensate Plaintiffs for that portion of the property actually taken?

4. Must Defendants compensate Plaintiffs for the time the property now "waived" was "taken" under the original designation?

5. Are Plaintiffs entitled to mediation fees?

6. Are Plaintiffs entitled to interest?

I.

IS MCLA 281.721(4) UNCONSTITUTIONAL IN THAT IT DOES NOT PROVIDE FOR COMPENSATION EQUAL TO THE TRUE VALUE OF THE PROPERTY TAKEN?

MCLA 281.721(4) provides in part that:

> . . . the value of the property may not exceed that share which the area in dispute occupies in the total parcel of land, of the state equalized evaluation of the total parcel, multiplied by 2, as determined by an inspection of the most recent assessment roll of the township or city in which the parcel is located.

Pursuant to this section, the Court limited the recovery of the Plaintiffs to twice the SEV of the property. This amount is substantially less than the fair market value of the parcel which has been described as being one of the last available large parcels of commercial real estate on M-59 in Oakland County.

Appendix D-3

A.

Article V of the Bill of Rights provides that:

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the State of Michigan also indicates in Article X, Section 2, that:

> Private property shall not be taken for public use without just compensation therefore being first made or secured . . .

The intent of the Bill of Rights and the Constitution is unmistakable.

> Just compensation . . . must put the party injured in as good position as he would have been if the injury had not occurred. It should neither enrich the individual at the expense of the public nor the public at the expense of the individual. *State Highway Commissioner v. Eilender*, 362 Mich. 697, 699 (1961) citing *In Re John C. Lodge Highway*, 340 Mich. 254 (1954).

This concept has been rigidly followed in the law of the State of Michigan and is embroidered into the Michigan Standard Jury Instructions in CJI2d 90.05.

In order to adequately comply with these mandates, we must use the actual fair market value of the property as the true measure of its value. Since only that measure can place the owner in as good a position as he would have been had there been no taking. *Consumers Power Co. v. Allegan State Bank*, 20 Mich. App. 720 (1969).

The government that, through its legislative power, decides to take a parcel of property cannot, through that same power, determine the fair compensation for its taking. See *Baltimore*

and O.R. Co. v. United States, 298 U.S. 349 (1935); *Monongahela Navigation Co. v. United States*, 148 U.S. 310 (1892). Only a court of law standing separate and apart from the executive and legislative branches of government should and does have the power constitutionally to fix "just compensation" for a taking. *Consumers Power Co. v. Allegan State Bank, supra.*

In drafting the Wetland Protection Act, the legislature was cognizant that many competing interests were at stake. This is evident from the attempts made to address the concerns of both the owners of potentially-affected property and the necessity of protecting our environment. Previously, this Court has noted a concern with the failure of the government to properly inventory potential wetland areas as required by MCLA 281.719. This section, if properly implemented, requires the Department of Natural Resources (DNR) to inventory on a county by county basis all of the potentially affected lands in the state. Under MCLA 281.720, each property owner with affected property would be notified of the possible change in the status of their property and the possible change in status would be printed on the tax bill. Obviously, this action would substantially affect the SEV of the subject property and an owner could demand a reduction in the taxes paid on the property.

Property owners in the position of the Plaintiffs in this case are faced with a dilemma. If they wish to institute a suit to have the property condemned, they cannot ask to have their taxes reduced because of the classification of the property as a wetland. They are required under the Act to continue to pay excessive taxes (in this case over $24,000 per year) while attempting to recover something for their property. To place any aggrieved party in this position is intolerable.

It is therefore the opinion of this Court that the limit on "just compensation" payable to the owners of property condemned under MCLA 281.721(4) is unconstitutional.

II.

CAN THE STATE MODIFY THE TAKING IN THIS CASE TO ALLOW DEVELOPMENT OF SOME OF THE PROPERTY AND THUS LIMIT THE AMOUNT OF COMPENSATION DUE THE PLAINTIFFS?

During the lengthy history of this case, the parties in good faith efforts to resolve the dispute had a plan prepared that allowed for the development of some of the perimeter of the property. This plan (known as the "Goga plan") would have required that some areas of the property delineated as wetlands be destroyed. However, other areas would be added to the wetland areas to offset this action.

Under MCLA 281.721(3)(C), the Defendants are now prepared to accept the Goga plan. This would allow use by the Plaintiffs of some property for limited commercial development. Of course there would need to be a reduction it the award to the Plaintiffs, as not all of the property would be condemned. This Court finds no objection to this approach and applauds the Defendants for this action. One must remember that the intent of the Wetland Protection Act is to minimize the impact of future growth on a valuable resource. The obvious conflict between these two highly necessary endeavors will continue unless we use a rational approach to resolving the conflicts. The testimony in this case showed that much of the property is a true wetland. Other portions of the wetland are marginal at best. Thus, to allow the "squaring off" of commercial lots on the perimeters of the property by use of small portions of carefully selected wetlands and the replacement of those with other comparable land is in this Court's view within the spirit of the law.

We must remember that the boundaries of a wetland, unlike those of a highway right of way, are much less clearly defined. The Court believes that the legislative intent in this case is harmonious with the law of eminent domain.

Therefore, those portions of the property defined as being part of the Goga plan may be exempted from the taking in this case. Conversely, those portions of the "high lands" that were to be added to the wetlands as an exchange shall be deemed condemned.

III.

WHAT IS THE FAIR COMPENSATION FOR THE ACREAGE TAKEN?

During trial, the testimony placed a fair market value of $5,941,181 for the entire parcel. Consequently, Plaintiffs shall recover the percentage of that figure computed by dividing the acres taken by the total acreage of the parcel to reach a fair compensation.

IV.

Plaintiff has lost the use of the "Goga" property for several years, going back to the time that this property was first declared a wetland. There is no question that government has the right to reduce the size of the parcel taken as noted above. However, it would be unfair to allow the government to tie up the property for such an extended time without some fair compensation awarded. However, this compensation is limited to that portion of the property not taken (the "Goga" property), since Plaintiffs will be awarded interest and fair market value on the portion actually condemned as a wetland. Thus, Plaintiffs shall recover the monthly overhead for carrying the portion of the property, i.e., interest payments, taxes, and insurance; that is being withheld from condemnation under the Goga plan. The Court is hopeful that the parties can agree on this figure without need for a further hearing. However, either side can ask for the Court's assistance on this point, if desired.

V.

MEDIATION FEES

This Court finds that mediation sanctions are available in this case. If either party has met the proper requirements, they may recover them.

VI.

ARE PLAINTIFFS ENTITLED TO INTEREST?

This Court awards interest to the Plaintiffs on the portion of the property condemned as a wetland from the date this lawsuit was began. Interest on the "carrying charges" for the Goga parcel shall run from the date of notice by the State of its intent to elect that remedy. Plaintiffs are to prepare a judgment in conformity with this Opinion.

/s/ William E. Collette
William E. Collette
Circuit Court Judge

Dated: 5/4/93

Appendix E-1

Filed 11/5/92

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

K & K CONSTRUCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY, a Michigan Corporation,

Plaintiffs,

vs

File No.: 88-12120-CM
HON. WILLIAM E. COLLETTE

THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES and STATE OF MICHIGAN,

OPINION AND ORDER

Defendants.

_____/

INTRODUCTION

Plaintiffs, K & K Construction, Inc., J.F.K. Company, and Resorts and Company, have sued the State of Michigan alleging that certain property has been condemned because of its designation as a wetland. While there was some question in this Court's mind as to who the correct plaintiffs are, the parties have stipulated for purposes of this litigation that the (named) Plaintiffs have standing to bring this suit. After a non-jury trial, this matter was taken under advisement and briefs and exhibits have been submitted and reviewed by this Court. Following is this Court's Opinion and Order.

FACTS

The property in this lawsuit is located on Highway M-59 in Oakland County, just west of Telegraph Road. The total area of the property being considered is about 82 acres. The Plaintiffs, in varying combinations, are the owners of the affected property that consists of four clearly defined parcels.

Appendix E-2

Parcel One

Parcel One was originally purchased by Joseph Kosik and several partners in 1976. The property was purchased for future commercial development because of Mr. Kosik's observations that M-59 was going to become a busy thoroughfare over the next several years. This property is the primary subject of this lawsuit and contains about 55 acres of land.

In the 1980's, Mr. Kosik, his wife and J.F.K. Company (a limited partnership comprised of Mr. Kosik and his five children) became the sole owners of this parcel of property. Prior to any of the parcel being designated as a wetland, some commercial development of the property occurred with a Ram's Horn Restaurant constructed on a small piece of the property by Mr. Kosik.

Before the inception of this lawsuit, Mr and Mrs. Kosik executed a quit claim deed of their interest in Parcel A. This recorded deed conveyed their interest in the property of J.F.K. Company in anticipation of J.F.K. Company obtaining a substantial mortgage on the property to pay the Kosiks for their interests and to finance a C.J. Barrymore's restaurant on the property. Mr. Kosik testified that J.F.K. Company will be required to reconvey an interest in the property back to the Kosiks if J.F.K. Company is unable to obtain the required financing.

Shortly after the above conveyance, the Plaintiffs, complying with the law, applied for a wetlands assessment from the Michigan Department of Natural Resources. After a survey of the property by a field agent, the DNR determined that, of the 55 acres of Parcel 1 approximately 27 acres lying at the very heart of the property was a protected wetland as defined under the Goemaere-Anderson Wetland Protection Act, MCLA Section 281.701, *et seq*. Accordingly, a permit to develop the property was denied and this litigation followed.

Exhibit A is an aerial survey of Parcel One, as well as portions of Parcels Two, Three, and Four. This exhibit

demonstrates that the wetland comprises approximately fifty percent (50%) of Parcel One. As most often is the case, the boundaries of the wetland are not uniform. The terrain is such that large fingers of protected property run throughout the center of the property, as well as other numerous irregular boundaries. Parcel One is zoned C-2, which is commercial under the Waterford Township zoning plan.

Parcel Two

Parcel Two is the contiguous parcel consisting of 16 acres directly to the south of Parcel One. It was purchased under the same arrangements as Parcel One and came into the joint ownership of Mr. and Mrs. Kosik, and J.F.K. Company at the same time as Parcel One. Title to this property belongs solely to J.F.K. Company as a result of an irrevocable testamentary trust created by Mr. Kosik and Mrs. Kosik well before this litigation was commenced. This trust agreement cannot be altered by the Kosiks. The property is zoned R-2, which is multiple family residential. A review of Exhibit A shows that a large portion of this parcel also consists of a wetland. The testimony confirmed that a small lake is on this parcel as well.

Parcel Three

At some point, J.F.K. Company became the owner in partnership with Resorts and Company (another Michigan partnership) of 9.34 acres south of, and contiguous with, Parcel 2. This parcel is fronting to the west on North Oakland Boulevard. These two entities have constructed apartment dwellings on this property that are in use today. This property is zoned R-2, the same as Parcel Two.

Parcel Four

J.F.K. Company also owns a 3.4 acre parcel of undeveloped land at the southern border of Parcel 3 that is contiguous with Parcel 3. This Court believes the zoning on this parcel is R-2.

Appendix E-4

DISCUSSION

I

"WHAT IS THE OVERALL SIZE OF THE PARCEL TO BE CONSIDERED IN DETERMINING IF A TAKING HAS OCCURRED IN THIS CASE?"

In a takings case under the Wetland Protection Act, the Court must determine what effect the regulation has on the overall economic value and/or use of the subject property. In order to make this evaluation, it is critical to define the area of land that constitutes the affected parcel. Each factual situation must be evaluated on its own merits.

The Plaintiffs have taken the position that this Court must only consider the 27 acres that have been declared a wetland in determining if a taking has occurred. They contend that the Court must ignore the economic value of the balance of the property and focus solely on the restricted acreage. Such is not the case. The law is well established that, in determining if a taking has occurred, the parcel as a whole must be considered. *Penn Central Transportation Co v New York*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

In *Ciampitti v US*, 22 Cl Ct 310 (1991), similar facts were addressed:

> "In the case of a land owner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands. If a governmental entity required a buffer, for example, around a housing development, a court would not entertain a separate claim for the land dedicated to buffer. It would no doubt take into consideration the extent to which the whole parcel could be developed. Factors such as the degree of contiguity, the dates of acquisition, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would

> enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment."

The Court noted that:

> "The Supreme Court has 'eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case.' *Connolly v Pension Benefit Guar Corp.*, 475 US 211, 224, 106 S Ct 1018, 1026, 89 L Ed 166 (1986). To aid in this determination, certain significant factors have been identified. One that is of particular relevance is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . ." *Penn Central Transp*, 438 US at 124, 98 S Ct at 2659."

This Court concludes that we must look at more than just the regulated area. The question presented here is: "How much more?"

Defendant takes the position that the Court must include not only all of Parcel One in the analysis, but also Parcels Two, Three and Four. In support of this view, Defendant cites the fact that J.F.K. Company has an ownership interest in all the parcels, the parcels are contiguous, and Parcels Two, Three, and Four have significant present or potential economic value apart from the wetland areas.

In making a determination as to whether or not these three parcels can be considered in making a taking analysis as to Parcel One, this Court must follow the principals set forth in

Bevan v Braden Township, 438 Mich 385 (1991). In *Bevan*, the Michigan Supreme Court ruled that two contiguous parcels of property, owned by one person, with a unity of use were to be considered as one parcel in a taking analysis.

After analyzing this case under the above factors, it is this Court's opinion that there is not a unity of ownership between Parcel One and Parcels Two, Three and Four for the reasons set forth herein. While it is true that J.F.K. Company has an interest in all four parcels of property, only Parcels Two and Four are owned solely by J.F.K. Company or held for its benefit. Parcel Three is owned jointly by the J.F.K. Company and Plaintiff Resort and Company.

It is true that the title to Parcel One is currently in the name of J.F.K. company. However, there is an equitable lien on the title to the property in favor of Mr. and Mrs. Kosik. The uncontroverted testimony at trial was that title to this parcel was transferred to J.F.K. Company by quit-claim deed for the sole purpose of obtaining mortgage financing. Mr. Kosik testified further that a deed to reconvey title would be required of J.F.K. Company if the financing could not be obtained. It is obvious that there can be no unity of ownership with the other parcels due to the different interests that have title or equitable interest in Parcel One.

In analyzing the unity of use of the four parcels, one obvious fact is clear. Parcel One has commercial zoning, while Parcels Two, Three and Four are zoned residential. It is apparent that parcels with differing zoning ordinarily have differing legal uses. No evidence to the contrary was submitted, and this Court therefore finds no unity of use as to the four parcels.

While on the map all four parcels are contiguous with each other, the fact that Parcel One has different zoning from the other three parcels renders this factor less significant than it might ordinarily be.

As noted above, applying the tests in *Bevan, supra*, to the facts of this case, it is this Court's opinion that Parcel One should be considered as a separate parcel in assessing the economic impact on the subject parcel due to the wetland designation.

II

"HAS THERE BEEN A TAKING OF PARCEL ONE?"

In deciding if a taking has occurred, the Court must review each case solely on its own merits. *Penn Central Trans Co v New York, supra*. In making this determination, two general lines of inquiry have been developed to guide the reviewing Court. In *Loveladies Harbor, Inc v US*, 31 ERC 1848 (1990) the Court noted:

> "First, a taking can occur where the imposition of a government regulation fails to substantially advance a legitimate governmental interest . . . Second, a taking can occur where the imposition of a governmental regulation has the effect of depriving the owner's land of all economic value." (citations omitted)

Obviously, we are not concerned in this case with the first analysis since the preservation of wetland areas has been determined by the legislature to be of prime importance to the people of Michigan. MCL Section 281.703.

In determining whether a government regulation so pervasively affects an owner's land to the extent that it is deprived of all economic value so as to constitute a "taking," the Appellate Courts look to three factors:

1) The character of the government action;

2) The economic impact of the regulation on the claimant; and

3) The extent to which the regulation has interfered with reasonable investment-backed expectations.

Loveladies, supra, at 391, citing *Keystone Bituminous Coal Ass'n v DeBenedictus*, 480 US 470, 495 (1987).

A. The Character of the Government Action.

The designation of property as a wetland regulates the ability of an owner to use the property. Under the Wetland Protection Act, certain activities are prohibited without a special permit. These include:

a. Placing fill;

b. Removal of soil or minerals;

c. Any use or development; and

e. Draining of surface waters.

Such restrictions, much like zoning laws that regulate building set backs, interfere with the ability to use property to the fullest extent. However, such regulation does not constitute a physical invasion or destruction of the property by government. Much like the lawns we grow on the restricted set-back areas of our residences, one is still free to enjoy many of the inherent rights of ownership. These include, among others, walking on the property; excluding others from it; hunting and fishing; harvesting and so on.

Clearly, the government regulation in this case, standing alone, does not so severely hamper the owners' use of this property as to constitute a total destruction or complete taking of Plaintiffs' property.

B. The Economic Impact on the Plaintiffs.

As pointed out above, the designated wetland area is an extremely irregular-shaped piece, comprised of 27 acres, carved out of the very heart of this property. The configuration of the wetland creates shallow strips along the edges of the parcel

where it would be possible to build. With the setback requirements of commercial property and the required parking, very little of the remaining land, along the roadway will be left for actual construction. The necessary act of evening off the edges of the buildable property where it abuts the wetlands will reduce the available acreage even more. The owners will be left with narrow strips of prime frontage with no prospect for any substantial economic development. While it is true that some financial value will remain, this court finds that what little economic value remains is but a small fraction of the economic value the property would have if all of it could be developed. This parcel is the last large commercial piece of property remaining on M-59 in Waterford Township and was bought long ago for investment purposes. This Court concludes from the evidence presented that the property is essentially worthless as commercial real estate.

C. The Extent That the Regulation Has Interfered with Reasonable Investment-backed Expectations.

Unlike many cases, this property was purchased specifically for commercial development in 1976. This was several years prior to the passage of the Wetland Protection Act. As can best be determined, this property has long been zoned and valued as desirable commercial real estate by Mr. Kosik and everyone else, including county and township government. The record discloses that over $20,000 per year in taxes are paid on this property. Over $2,455,000 has been invested in it since 1976.

The evidence disclosed that, unlike many protected properties, this land is not a characteristic wetland. The testimony indicates that heavy equipment has been driven all over it. It is mowed regularly without any problems. Numerous test borings done a Mr. Kosik's directions indicated that much of the property is sand, and it is suitable for construction with piling needed in some areas.

This Court finds that the Plaintiffs in good faith purchased this property at significant expense, paid their commercial taxes without complaint, and are now being deprived of the reasonable economic use of their property because of the applicability of wetland regulations that were not obvious to anyone. There does not appear to have been any effort by these Plaintiffs to attempt to manipulate the property to create a better case for themselves. To the contrary, many of the good faith actions by the Kosiks, such as conveying their interest in the property to J.F.K. Company, would tend to obviate the Plaintiffs' claims. It is obvious that there was no expectancy that this property would be deemed a wetland at any time prior to its designation as such by the DNR.[1]

According to the evidence, Plaintiff is unable to viably develop this property as it now sits with any reasonable expectation of recovering more than a small percentage of the monies invested in good faith in the property. Under a plan developed by Plaintiffs, while negotiating a possible resolution of this case (the "GOGA" plan), approximately $800,000 to $1,000,000 could be realized by selling off parcels around the edges of the property. However, this plan requires that some of the wetlands be filled which would violate the law.

According to Mr. Kosik, the property is economically unusable as it now sits due to the zoning setback, parking, wetland and other regulations.

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[1] This Court feels compelled to comment concerning the failure of the State to prepare the Wetland inventory required by M.C.L.A. Sec. 281.719. Under that provision a preliminary assessment was to be done which would give the owners of property notice that their property might well fall under these regulations. Obviously, such an inventory, if completed would place these owners and others on notice of the potential character of their property. This Court notes that the Goemaere-Anderson Act was passed in 1979. It would seem that 13 years is long enough to have completed this assessment.

There was testimony from defense expert Mr. Paul Stoppert that he believed that the edges of the property could be economically developed. This was refuted by Plaintiffs' experts, Mr. Goga and Mr. James Clarkson. Also, Mr. Kosik's testimony refuted Mr. Stoppert. Based on the testimony, this Court finds that the ability of the Plaintiffs to locate small, relatively uneconomical buildings around the edges of this parcel does not make it economically viable.

In summary, this Court determines that the geographic configuration of the wetland so restricts the ability to use Parcel One, that the Plaintiffs have been deprived of any reasonable return on the good faith economic investment they have made.

This Court enters judgment for the Plaintiffs and finds that this property has been condemned by application of the Wetland Preservation Act.

THEREFORE, IT IS HEREBY ORDERED that the Defendant shall comply with Sec. 281.721(3). The State shall determine which course of action under said Act it will take within 30 days of the date of this Opinion and Order. If the State shall decide to compensate the Plaintiffs for the value of the property then the compensation shall be twice the State equalized valuation of the affected property.[2]

IT IS SO ORDERED.

11/5/92

/s/ WILLIAM E. COLLETTE
WILLIAM E. COLLETTE

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[2] Section 281.721(4) requires that compensation not exceed twice the state equalized valuation. In this case, the commercial value exceeds twice that value, but Plaintiffs' recovery is limited by the law.